07-87 JUL 23 2007

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In the Supreme Court of the United States

SEAN BREEN, ET AL.,

Petitioners,

v.

J. MALON SOUTHERLAND, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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July 23, 2007

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QUESTION PRESENTED

Whether the federal circuit erred in deciding that the right to bodily integrity protected by the state-created danger doctrine was not clearly established as cf November 17, 1999, such that victims of the Texas A&M University Bonfire collapse on that date could assert claims for relief in the Fifth Circuit.

PARTIES TO THE PROCEEDING

The following Plaintiffs (now Petitioners herein) asserted claims in the trial court below[1]:

SEAN BREEN;

CHRISTOPHER BREEN, Deceased;

JOHN E. BREEN;

MARIAN K. BREEN;

JAQUELYNN KAY SELF, Individually and as Administratrix of the Estate of JERRY DON SELF, Deceased;

KATHY MCCLAIN ESCAMILLA, Individually and as Adminstratrix of the Estate of Bryan A. McClain, Deceased;

PHILLIP MCCLAIN;

ANDREA HEARD, Individually and as Administratrix of the Estate of Christopher Lee Heard, Deceased;

LESLIE G. HEARD;

GREGORY ANTHONY POWELL, Individually and as Administrator of the Estate of Chad A. Powell, Deceased;

BEVERLY JILL POWELL;

MATTHEW LYNN ROBBINS;

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[1] This Petition for Writ of Certiorari seeks review of six identical judgments entered on the same date by the trial court. The judgments sought to be reviewed involve identical or closely related questions and thus Petitioners have filed this single Petition pursuant to Supreme Court Rule 12.4.

PARTIES TO THE PROCEEDING – Continued

DOMINIC M. V. BRAUS;

NANCY BRAUS;

JOHN ANDREW COMSTOCK;

DIXIE ANN ZINNEKER;

LAUREN N.T. SCANLAN;

HOWARD SCANLAN;

DENISE SCANLAN;

BILL DAVIS;

JAMES KIMMEL; and

WALIETA KIMMEL.

The following individuals were Defendants in the trial court below and are Respondents herein:

RAY M. BOWEN;

J. MALON SOUTHERLAND;

WILLIAM KIBLER;

RUSSELL W. THOMPSON;

JOHN J. KOLDUS, III;

MAJOR GENERAL M. T. HOPGOOD, JR.;

DONALD J. JOHNSON;

ZACK COAPLAND;

KEVIN JACKSON;

JAMES R. REYNOLDS;

ROBERT HARRY STITELER, JR.; and

MICHAEL DAVID KRENZ.

PARTIES TO THE PROCEEDING – Continued

Texas A&M University was named as a Defendant but dismissed by the trial court and was not a party to the final judgment. There are no non-governmental corporations that are parties to this proceeding.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully seek a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Opinion of the Fifth Circuit was entered on April 24, 2007 and is reported at 485 F.3d 325 (5th Cir. 2007), and attached to the Appendix hereto as App. 1-28. It is hereafter referred to as the Opinion below.

JURISDICTION

The judgment of the Fifth Circuit was entered on April 24, 2007. There were no motions for rehearing filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States of America Amendment 14, § 1

Citizens of the United States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life,

liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 42 United States Code § 1983

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such office's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Introduction.

This case addresses the recognition and adoption of the state-created danger doctrine by the various federal circuits. Petitioners are students and families of students who were killed or injured by the collapse of the Texas A & M University ("TAMU") bonfire in November 1999.

The collapse of the massive bonfire structure being assembled on the TAMU campus killed twelve and injured twenty seven young men and women. The Plaintiffs, eleven students or their survivors, asserted claims under 42 U.S.C. § 1983 in six separate complaints filed in federal district court in the Southern District of Texas, against various TAMU administrators ("University Officials") for injuries and damages arising from the collapse.

Plaintiffs asserted a state-created danger theory of liability against the University Officials, predicated on the University Officials' knowing and affirmative actions in sponsoring the hazardous Bonfire construction. The Plaintiffs argued that the affirmative conduct by the University Officials in approving the appointment of the student leaders, in recognizing the Bonfire committee as an official student organization, in making available TAMU resources and a campus location for the construction of the Bonfire, and in permitting the construction to commence and proceed under the direction of student leaders and in the absence of any effective supervision or control. The Plaintiffs asserted that the University Officials created the risk of harm to Plaintiffs that would not otherwise have existed and enhanced the risk of harm to the student workers, such as Plaintiffs, that such a dangerous project entailed.

Factual Background

TAMU was founded as a state university in 1876 and is steeped in tradition, the most prominent of which is the construction and burning of the annual Bonfire. At its inception in 1909, the Bonfire stack consisted of little more than piles of wood and trash, but over the years its design

evolved into a massive structure. The Bonfire structures of more recent years were made up of several thousand logs arranged in a multi-story, two million pound log structure, held together principally by bailing wire. The Bonfire was constructed each Fall on the TAMU campus at a location designated by University Officials. TAMU approved the appointment of certain student leaders, known as "red-pots" to oversee the design and construction of the Bonfire. Several thousand students participated in the several week long activity of cutting down trees, transporting the logs to the campus, sorting and storing the logs on the campus, and assembling the actual bonfire structure. Although at one time these activities had taken place with the assistance of TAMU professional engineering and architectural faculty and other employees, by the mid-1990's, TAMU officials had decided not to provide any oversight over the construction portion of the activity. TAMU did, however, maintain a "Bonfire Advisory Committee" comprised of TAMU faculty and staff that controlled other non-technical aspects of the activity.

On November 17, 1999, while dozens of students were either standing on the Bonfire stack or hanging on ropes attached to the top of the Bonfire stack, it suddenly collapsed, killing twelve students and injuring twenty-seven others, some of whom were trapped in the massive pile of fallen logs for hours. Subsequent investigations into the cause of the collapse cited factors such as the sloping ground selected by the University Officials for the construction, the elimination of certain safety features such as interlocking logs, piers, and safety cables, and the improper stacking of logs as the reason for the sudden collapse. Since the collapse, TAMU has not permitted bonfires to be built on university property pending the outcome of this litigation.

Procedural Background

Plaintiffs filed six separate complaints seeking damages for injuries and deaths caused by the TAMU Bonfire collapse. The Hon. Samuel B. Kent of the District Court for the Southern District of Texas dismissed Plaintiffs' claims pursuant to FED. R. CIV. P. 12(b)(6) for failure to state a claim upon which relief could be granted. The Plaintiffs appealed and the Fifth Circuit reversed the district court's dismissal of the actions, holding the Plaintiffs had adequately "stated a section 1983 claim under the state-created danger theory." *Scanlan v. Texas A&M University,* 343 F.3d 533, 538 (5th Cir. 2003); (App. 40). In its opinion, the Fifth Circuit explicitly recognized that this case presents questions of fact:

> Whether deliberately delegating the construction of the bonfire stack to students the University Officials allegedly knew were not qualified to handle such a dangerous project, and whether deliberately providing no supervision to students in building the bonfire even though they knew the students were not qualified to build the stack, constituted deliberate indifference presents fundamental questions of fact.

Scanlan, 343 F.3d at 539; (App. 41).

After remand, the University Officials renewed their Motion for Summary Judgment. By an Order and Final Judgment signed May 21, 2004 and entered on May 24, 2004, Judge Kent granted the Defendants' Renewed Motion for Summary Judgment. The District Court found that questions of fact existed regarding whether the Defendants increased the danger to Plaintiffs ("Defendants are not entitled to summary judgment based on qualified immunity on the grounds that they did not

increase the danger to the victims") (App. 52). The District Court also found that questions of fact existed regarding whether the Defendants acted with deliberate indifference. ("At this stage in the proceedings, there remain multiple questions of fact as to whether Defendants acted with deliberate indifference.") (App. 54).

Despite these findings, the District Court granted summary judgment, concluding "that the state-created danger theory of substantive due process was not clearly established at the time of Defendants' Bonfire-related activities." (App. 57-58). The Fifth Circuit in the Opinion below affirmed the District Court summary judgment, which gave rise to this Petition. (App. 1).

REASONS FOR GRANTING THE PETITION

In 1989, this Court decided *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189 (1989). *DeShaney* affirmed that in certain limited circumstances, the United States Constitution imposes on the state affirmative duties of care and protection. *DeShaney*, 489 U.S. at 198. According to many subsequent opinions, one such limited circumstance arises when the state exposes a person to a danger of its own creation, that is, when the state creates the danger.

In *DeShaney*, a county agency was sued for violating a child's due process rights by failing to protect the child from his father's abuse. *Id.* at 193. This Court held that the agency was not liable because it did not create the danger that the child faced nor do anything to render the child more vulnerable to the danger. Justice Rehnquist went on to comment:

> [the state] played no part in [the danger's] creation, nor did it do anything to render [the plaintiff] any more vulnerable to them.

Id. at 201. It is this dicta that is commonly cited as the basis for the development of the state-created danger theory. *McClendon v. City of Columbia,* 305 F.3d 314 (5th Cir. 2002); *Kneipp v. Tedder,* 95 F.3d 1199, 1205 (3d Cir. 1996); *Uhlrig v. Harder,* 64 F.3d 567, 572 n.7 (10th Cir. 1995).

In the 18 years that have elapsed since *DeShaney,* courts in every federal circuit have adopted some version of the state-created danger doctrine. An electronic search of the terms "state . . . created . . . danger" in federal cases since *DeShaney* yields 661 results, yet this Court has not addressed the issue since *DeShaney.* The Court should grant the Petition in order to reaffirm the existence of the state-created danger doctrine and its applicability to cases such as the one at bar.

I. The origins of the state-created danger doctrine.

Although this Court's holding in *DeShaney* is commonly cited as the genesis of the state-created danger doctrine, it is important to remember that before *DeShaney,* several circuits recognized the state-created danger theory in some form. *See Wells v. Walker,* 852 F.2d 368, 370-71 (8th Cir. 1988); *Escamilla v. City of Santa Ana,* 796 F.2d 266, 269 (9th Cir. 1986); *Estate of Gilmore v. Buckley,* 787 F.2d 714, 722 (1st Cir. 1986); *Jones v. Phyfer,* 761 F.2d 642, 646 (11th Cir. 1985); *Bowers v. DeVito,* 686 F.2d 616, 618 (7th Cir. 1982).

For an excellent discussion of the pre-*DeShaney* development of state-created danger, see David Pruessner,

The Forgotten Foundation of State-Created Danger Claims, 20 REV. LITIG. 357, 359-61 (2001). Pruessner discusses the evolution of the so-called "snake pit" cases – a name derived from a quote by Justice Posner in *Bowers v. DeVito*, 686 F.2d 616 (7th Cir. 1982):

> If the state puts a man in a position of danger from private people and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit.

Id. at 618.

A. After *DeShaney v. Winnebago County Dept. of Social Servs.*

After this Court's opinion in *DeShaney,* numerous courts around the country recognized the state-created danger theory, and applied the theory to various fact situations, finding the theory imposed liability on state actors. A chronology of each circuit's application of the standard, and the factual circumstances in which it was applied are set forth below:

9th Circuit	*Wood v. Ostrander,* 879 F.2d 583, 590 (9th Cir. 1989) (adopting the state-created danger theory in the context of a § 1983 claim brought against police officers by the passenger of an impounded vehicle who, in 1984, was raped after officers allegedly abandoned her on the side of the road);
11th Circuit	*Cornelius v. Town of Highland Lake*, 880 F.2d 348, 356 (11th Cir. 1989) (overruled on other grounds by *White v. Lemacks,* 183 F.3d 1253, 1256 (11th Cir. 1999)) (adopting

the state-created danger theory in the context of a § 1983 claim brought against town and prison officials by a town clerk who, in 1985, was abducted and terrorized by prison inmates assigned to a community work program);

8th Circuit — *Freeman v. Ferguson*, 911 F.2d 52, 54-55 (8th Cir. 1990) (adopting the state-created danger theory in the context of a § 1983 claim brought on behalf of a woman killed by her estranged husband against a police chief who allegedly directed his officers to ignore her pleas for police assistance);

2nd Circuit — *Dwares v. City of New York*, 985 F.2d 94, 98-99 (2d Cir. 1993) (adopting the state-created danger theory in the context of a § 1983 claim brought by demonstrators against police officers who allegedly conspired to permit a group of "skinheads" to assault the demonstrators with impunity during a July 4, 1989 flag burning event);

7th Circuit — *Reed v. Gardner*, 986 F.2d 1122, 1125 (7th Cir. 1993) (adopting the state-created danger theory in the context of a § 1983 claim brought by motorists who were injured in a September 1988 automobile collision with an allegedly drunk driver against police officers who had previously failed to arrest the driver);

10th Circuit — *Uhlrig v. Harder*, 64 F.3d 567, 572 (10th Cir. 1995) (accepting the state-created danger theory, but rejecting a § 1983 claim brought against state mental health officials on behalf of an activity therapist who was killed by a mental hospital patient);

4th Circuit — *Pinder v. Johnson*, 54 F.3d 1169, 1175(4th Cir. 1995) (*en banc*), *cert. denied*, 516 U.S. 994, (1995) (considering, but not recognizing a state-created danger claim and noting that there may be some "point on the spectrum between action and inaction" in which the state would be implicated in the harm caused by third parties);

3rd Circuit — *Kneipp v. Tedder*, 95 F.3d 1199, 1201, 1208 (3d Cir. 1996) (adopting the state-created danger theory in the context of a § 1983 claim brought against a city and police officers on behalf of a woman who suffered brain damage in January 1993 when the officers allegedly left her alone to walk home on a cold night while she was intoxicated);

1st Circuit — *Frances-Colon v. Ramirez*, 107 F.3d 62, 63-64 (1st Cir. 1997) (declining to adopt but holding that a substantive due process interest in "bodily integrity" can support a personal injury claim under § 1983 in the rare and exceptional cases when a government employee affirmatively acts to increase the threat of harm to the claimant); *see also Rodriguez-Cirilo v. Garcia*, 115 F.3d 50 (1st Cir. 1997);

6th Circuit — *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1066-67 (6th Cir. 1998) (adopting the state-created danger theory in the context of a § 1983 claim brought by undercover police officers alleging that city officials released personal information from their personnel files to the drug conspirators that the officers were investigating);

D.C. Circuit	*Butera v. District of Columbia*, 235 F.3d 637, 651 (D.C. Cir. 2001) (adopting the state-created danger theory, but rejecting a § 1983 claim brought against a police department and individual officers on behalf of an individual who was shot while working as an undercover operative for the department).
5th Circuit	*Breen v. Texas A & M University*, 435 F.3d 325 (5th Cir. 2007); (App. 1).
(Opinion below)	(recognizing the validity of the state-created danger theory, but holding that it was not clearly established in the Fifth Circuit in November 1999).

All circuit courts have recognized and adopted some form of state-created danger theory of liability. *See Butera v. District of Columbia,* 235 F.3d 637, 648-49 (D.C. Cir. 2001), n.10 (collecting cases from each of the circuits discussing the state-created danger theory).

B. Development of the state-created danger in the Fifth Circuit.

As the Opinion below notes, the Fifth Circuit was slow to embrace the state-created danger doctrine. *Breen* at 340; (App. 25). However, beginning as early as 1992, the Court began to discuss the theory and to outline the elements of the doctrine.

Beginning with *Salas v. Carpenter*, 980 F.2d 299 (5th Cir. 1992), the Fifth Circuit wrestled with the state-created danger doctrine. The Court acknowledged that the doctrine had been adopted in sister circuits, and defined the elements of the doctrine in the Fifth Circuit for

purposes of appellate review. The Fifth Circuit, however, initially stopped short of adopting the theory.

Notable cases included: *Leffall v. Dallas Indep. Sch. Dist.*, 28 F.3d 521, 530 (5th Cir. 1994) ("we have found no cases in our circuit permitting § 1983 recovery for a substantive due process violation predicated on a state-created danger theory"); *Johnson v. Dallas Indep. Sch. Dist.*, 38 F.3d 198, 201 (5th Cir. 1994) ("no Fifth Circuit case has yet predicated relief on a state created danger theory"); *Randolph v. Cervantes*, 130 F.3d 727, 731 (5th Cir. 1997) ("the state-created danger theory has not been adopted in this Circuit"); *Piotrowski v. City of Houston*, 237 F.3d 567, 584 (5th Cir. 2001) ("although this court has discussed the contours of the 'state-created danger' theory on several occasions, we have never adopted that theory").

C. The *McClendon* Opinions

McClendon I

The Fifth Circuit finally recognized and adopted the state-created danger doctrine in *McClendon v. City of Columbia*, 258 F.3d 432 (5th Cir. 2001), *vacated & reh'g granted en banc*, 285 F.3d 1078 (5th Cir. 2002) ("*McClendon I*"). In *McClendon*, a police officer loaned a gun to a police informant to protect himself from likely harm from McClendon, the man against whom he had informed. The informant then used the gun to shoot McClendon in the face, permanently blinding him. *McClendon I*, 258 F.3d at 434-38.

The district court for the Southern District of Texas dismissed the case on the grounds that the Fifth Circuit had not adopted the state-created danger doctrine and

that even if the doctrine applied, its parameters were not clearly established at the time of the shooting – July 1993. On appeal, the initial panel unanimously disagreed.

Judge Politz discussed the development of the state-created doctrine, both outside the circuit and through references in cases within the Circuit. The court held that under the facts, McClendon established a right to relief under the state-created danger doctrine, and that the individual police officer was not entitled to qualified immunity because the application of the state-created danger theory was clearly established by July 1993. *Id.* at 438-41. However, the *McClendon I* panel opinion was short-lived.

McClendon II

The *McClendon I* defendants moved for rehearing *en banc,* which the Fifth Circuit granted. The panel opinion was ultimately withdrawn and a per curium opinion, *McClendon II,* 285 F.3d 1078 (5th Cir. 2002), was handed down by a divided court. In *McClendon II*, the *en banc* court neither explicitly adopted nor rejected the state-created danger doctrine. Instead, it held that the factual circumstances in the case were insufficient to reach the level necessary to invoke the doctrine. Essentially, it made a non-decision.

Judge Parker, writing in dissent joined by Judges Wiener and DeMoss, noted the majority's unwillingness to take a definitive position on state-created danger, asserting that their action "cannot be defended and leaves this area of circuit law in a perpetual state of confusion." *Id.* at 334. Parker goes on, "In refusing to make this decision, the majority attempts to create the illusion that no Circuit

split exists in hopes of avoiding Supreme Court scrutiny." *Id.* at 338 n.10. Parker's plea to the majority fell on deaf ears in *McClendon II*, as the majority of the justices refused to clarify the Circuit's stance on state-created danger.

D. Post-*McClendon*

Following the Fifth Circuit's *en banc* reverse course in *McClendon II*, the court continued to review state-created danger cases. In *Morin v. Moore*, 309 F.3d 316 (5th Cir. 2002), the Fifth Circuit wrote of their holding in *McClendon II*, "we neither adopted nor rejected the state created danger theory." *Id.* at 321. The Court expressly stated that "this Court had *recognized* but never *adopted* the state-created danger theory." *Id.* (emphasis added).

In *McKinney v. Irving Independent School District*, 309 F.3d 308 (5th Cir. 2002), handed down at the same time as *Morin*, the court again stated: "this Court had *recognized* but never *adopted* the state-created danger theory." *Id.* at 313 (emphasis added).

In August 2003, the Fifth Circuit released its opinion in *Scanlan v. Texas A&M University,* 343 F.3d 533 (5th Cir. 2003), holding that the Petitioners herein adequately "stated a section 1983 claim under the state-created danger theory." *Id.* at 538; (App. 40).

But by November 2003, the Fifth Circuit again re-treated. In *Rivera v. Houston Independent School District*, 349 F.3d 244 (5th Cir. 2003), the court reviewed on appeal a trial court's dismissal of a state-created danger claim. In *Rivera*, the parents of a middle school student sued the school board for failing to protect their son from gang

violence at the school. The court's earlier "recognized but never adopted" language was replaced with this statement:

> we have *never recognized* state-created danger as a trigger of State affirmative duties under the Due Process clause.

Id. at 249 (emphasis added).

The following year, the Court again addressed the state-created danger theory in *Beltran v. City of El Paso*, 367 F.3d 299 (5th Cir. 2004), a claim arising from a "911" operator's alleged failure to properly dispatch police units, resulting in the deaths of two individuals. The court couched the history of the state-created danger doctrine as follows:

> this court has consistently *refused to recognize* a 'state-created danger' theory of § 1983 liability.

Id. at 307 (emphasis added).

In March 2006, the Fifth Circuit released its opinion in *Rios v. City of Del Rio,* 444 F.3d 417 (5th Cir. 2006). In *Rios*, the plaintiff, a U.S. Customs officer, sought recovery for damages he sustained when struck by a police vehicle driven by an escaping prisoner. He asserted claims under the state-created danger doctrine against the police chief and officer, who unsuccessfully moved for dismissal under FED. R. CIV. P. 12(b).

The Fifth Circuit reversed and dismissed the claims, stating:

> . . . this court has frequently spoken of the "state-created danger" theory, and has discussed its various permutations and requirements as applied in

> other circuits, but neither the Supreme Court nor this court has ever either adopted the state-created danger theory or sustained a recovery on the basis thereof. We have, however, many times refused to allow recovery sought to be predicated thereunder."

Id. at 422.

II. The Fifth Circuit's treatment of the state-created danger doctrine before November 1999 gave fair notice to reasonable university officials that their conduct with respect to the danger created by the Texas A&M Bonfire stack could violate students' constitutional rights

Focusing on the period before November 1999, and not the period after November 1999, an examination of Fifth Circuit case law indicates that the court examined state-created danger cases utilizing a consistent framework and definition of the doctrine for at least five years before the Bonfire collapse.

In 1994, the Fifth Circuit examined a § 1983 claim based on the state-created danger doctrine in *Leffall v. Dallas Independent School District*, " . . . assum[ing] without deciding that our court would recognize the state created danger theory." *Leffall v. Dallas Indep. Sch. Dist.*, 28 F.3d 521, 530 (5th Cir. 1994).

Again in 1994, the Fifth Circuit in *Johnson v. Dallas Independent School District,* 38 F.3d 198 (5th Cir. 1994), discussed the state-created danger theory in detail. The court noted that the state-created danger theory had been applied in several cases from other circuits, and that those cases uniformly held that state actors may be liable if they

created the plaintiffs' peril, increased the plaintiffs' risk of harm, or acted to render the plaintiffs more vulnerable to danger. *Johnson* at 200.

In 1995, the Fifth Circuit in *Piotrowski v. City of Houston,* 51 F.3d 512 (5th Cir. 1995) (*"Piotrowski I"*), examined the plaintiff's claims under the state-created danger doctrine. The court noted that even though it had not affirmatively held that the state-created danger theory was an exception to the general rule that the general public is not *entitled* to governmental aid, it had addressed the basic elements of the state-created danger theory. *Piotrowski I* at 515.

In 1997, the Fifth Circuit, in *Doe v. Hillsboro Independent School District*, again confirmed the elements required to establish liability in the state-created danger context. *Doe v. Hillsboro Indep. Sch. Dist.,* 113 F.3d 1412, 1414 (5th Cir. 1997) (*en banc*).

Again in 1997, the Fifth Circuit in *Piotrowski v. City of Houston*, 237 F. 3d 567 (5th Cir. 1997) (*Piotrowski II*), repeated the two requirements of the state-created danger theory outlined in *Piotrowski I*, that the state actors increased the danger to the plaintiff and then acted with deliberate indifference.

Finally, in 1999, the Fifth Circuit again examined facts alleged to invoked a state-created danger theory in *Saenz v. Heldenfels Bros., Inc.*, 183 F.3d 389 (5th Cir. 1999), explaining that in the absence of a known victim, the doctrine does not apply. *Saenz* at 392.

III. The Opinion below misconstrues the Fifth Circuit's prior opinion in *Salas v. Carpenter* and fails to determine the reasonableness of the University Officials' conduct in light of well-established precedent

A right will be considered clearly established only when its contours are sufficiently clear so that a reasonable official would understand that what he is doing violates that right. *Anderson v. Creighton*, 483 U.S. 635, 640, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987). "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in light of pre-existing law the unlawfulness must be apparent." *Id.*

The Opinion below begins its analysis with *Salas v. Carpenter*, 980 F.2d 299 (5th Cir. 1992), stating "*Salas* 'did not address the viability of the state-created danger theory or define the contours of an individual's right to be free from state-created dangers.'" (App. 24) *quoting McClendon v. City of Columbia*, 305 F.3d 314, 330 (5th Cir. 2002).

The *Salas* court stated:

> If the state actor has a requisite mental state, a due process deprivation could occur under two sets of circumstances. First, a procedural or substantive due process violation could occur if a state official causes injury by arbitrarily abusing governmental power. Second, a substantive due process violation could occur if uncommon circumstances create a duty for the state to protect a particular person. . . .
>
> We have held that a constitutional deprivation can result from "tortious conduct exceeding mere

> negligence but not quite rising to the level of intentional, e.g., deliberate (or conscious) indifference, recklessness, or gross negligence."

Salas, 980 F.2d at 307.

The *Salas* court further noted that other circuits found a denial of due process when the state creates the faced dangers. The *Salas* court did not reject the doctrine as unsound, but rather found that the officer in that case had not increased the plaintiff's "vulnerability to danger in the sense envisioned by the Court in DeShaney." *Id.* at 309. The Fifth Circuit's decision in *Salas* was sufficient, by itself, to give the University Officials notice that their conduct would violate the rights of the student Bonfire workers.

Further, before November 1999, the Fifth Circuit placed actors such as the University Officials on notice that it would consider non-Fifth Circuit precedent in determining both the establishment of the legal doctrines and the contours of rights in the Fifth Circuit:

> As a general proposition, we will not rigidly define the applicable body of law in determining whether relevant legal rules were clearly established at the time of the conduct at issue. Relying solely on Fifth Circuit and Supreme Court cases, for example, would be excessively formalistic, but they will loom largest in our inquiries. In determining what the relevant law is, then, a court must necessarily exercise some discretion in determining the relevance of particular law under the facts and circumstances of each case, looking at such factors as the overall weight of authority, and the status of the courts that render substantively relevant decisions, as well as

> the jurisdiction of the courts that render substantively relevant decision.

Melear v. Spears, 862 F.2d 1177, 1184 n.8 (5th Cir. 1989).

CONCLUSION

The University Officials' conduct violated the student workers' rights to bodily integrity as protected by the state-created danger theory regardless of how the contours of the right are framed. In other words, had the Bonfire collapsed in the Eighth Circuit or the Eleventh Circuit or any of the other Federal Circuits, the elements of the state-created danger theory, as it existed at the time in each circuit, would have given rise to liability on the part of the University Officials.

The Opinion below recognized that "a majority of federal circuits had approved of the state-created danger theory in a general sense by November 18, 1999" but then stated "there was not a consensus among those courts as to the contours of the underlying substantive due process right." (App. 26). The Opinion below, however, failed to recognize that under any formula of the theory, the University Officials' conduct was unlawful.

The Opinion below noted that the Plaintiffs cited no appellate cases with facts similar to the case at bar, and that no other officials at a public university had encouraged unqualified and inexperienced students to construct an enormous bonfire stack does not make the University Officials' conduct more reasonable. (App. 16). However, the state-created danger theory had been applied in school

settings at that time. *See, e.g., Sciotto v. Marple Newtown Sch. Dist.,* 81 F. Supp. 2d 559 (E.D. Pa. 1999).

Regardless of the emerging contours of the state-created danger theory, no reasonable official could have believed, by November of 1999, that encouraging unqualified and inexperienced students to build an enormous bonfire stack without adequate supervision by university professional engineering and architectural personnel would not give rise to a violation of the right to bodily integrity. Considering this Court's statements in *DeShaney* and the prevailing law across the nation, it is apparent that no reasonable school official could have believed at the time of the Bonfire collapse, that the University Officials' conduct, as alleged in the Plaintiffs' Complaints, was lawful.

PRAYER

For all of the foregoing reasons, Petitioners respectfully pray that the Supreme Court grant review of this matter.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 04-40712

SEAN BREEN, as Administrator of the Estate of Christopher Breen; CHRISTOPHER BREEN; JOHN E. BREEN; MARIAN K. BREEN,

Plaintiffs-Appellants,

VERSUS

TEXAS A&M UNIVERSITY; ET AL.,

Defendants,

TEXAS A&M UNIVERSITY; J. MALON SOUTHERLAND, in his individual capacity; RUSSELL THOMPSON, in his individual capacity; RAY BOWEN,

Defendants-Appellees.

Consolidated with
No. 04-40713

JAMES KIMMEL, as representative of the Estate of Lucas Kimmel (deceased); JAMES KIMMEL; WALIETA KIMMEL,

Plaintiffs-Appellants,

VERSUS

TEXAS A&M UNIVERSITY; ET AL.,

Defendants,

TEXAS A&M UNIVERSITY; J. MALON SOUTHERLAND, in his individual capacity; RUSSELL J. THOMPSON, in his official capacity; RAY BOWEN, in his individual capacity; WILLIAM L. KIBLER, in his individual capacity; JOHN J. KOLDUS, III, in his individual capacity,

Defendants-Appellees.

Consolidated with
04-40714

BILL DAVIS,

Plaintiff-Appellant,

VERSUS

TEXAS A&M UNIVERSITY; ET AL.,

Defendants,

TEXAS A&M UNIVERSITY; J. MALON SOUTHERLAND in his individual capacity; RUSSELL THOMPSON, in his individual capacity; RAY BOWEN, in his individual capacity; WILLIAM L. KIBLER, in his individual capacity; JOHN J. KOLDUS, III, in his individual capacity,

Defendants-Appellees.

Consolidated with
04-40715

HOWARD SCANLAN; DENISE SCANLAN; LAUREN N. T. SCANLAN,

Plaintiffs-Appellants,

VERSUS

TEXAS A&M UNIVERSITY; ET AL.,

Defendants,

TEXAS A&M UNIVERSITY; J. MALON SOUTHERLAND, in his individual capacity; RUSSELL THOMPSON, in his individual capacity; RAY BOWEN, in his individual capacity; WILLIAM L. KIBLER, in his individual capacity; JOHN J. KOLDUS, II, in his individual capacity,

Defendants-Appellees.

Consolidated with
04-40780

JOHN ANDREW COMSTOCK; DIXIE ANN ZINNEKER,
Plaintiffs-Appellants,

VERSUS

TEXAS A&M UNIVERSITY; ET AL.,
Defendants,

TEXAS A&M UNIVERSITY; J. MALON SOUTHERLAND, in his individual capacity; RUSSELL THOMPSON, in his individual capacity; RAY BOWEN; WILLIAM L. KIBLER, in his individual capacity; JOHN J. KOLDUS, III, in his individual capacity,
Defendants-Appellees.

Consolidated with
04-40812

JAQUELYNN KAY SELF, Individually and as Administratrix of the estate of Jerry Don Self, Deceased; KATHY MCCLAIN ESCAMILLA, Individually and as Administratrix of the Estate of Bryan A. McClain, Deceased; PHILLIP MCCLAIN, ANDREA HEARD, Individually and as Administratrix of the Estate of Christopher Lee Heard, Deceased; LESLIE G. HEARD; GREGORY ANTHONY POWELL, Individually and as Administrator of the Estate of Chad A. Powell, Deceased; BEVERLY JILL POWELL; MATTHEW LYNN ROBBINS; DOMINIC M. V. BRAUS; NANCY BRAUS,
Plaintiffs-Appellants,

VERSUS

RAY M. BOWEN; J. MALON SOUTHERLAND; WILLIAM KIBLER; RUSSELL W. THOMPSON; JOHN J. KOLDUS, III; M. T. HOPGOOD, JR., Major General; DONALD J. JOHNSON; ZACK COAPLAND; KEVIN

JACKSON; JAMES R. REYNOLDS; ROBERT HARRY STITELER, JR.; MICHAEL DAVID KRENZ,

Defendants-Appellees.

Appeals from the United States District Court
For the Southern District of Texas

(Filed Apr. 24, 2007)

Before HIGGINBOTHAM, WIENER, and DENNIS, Circuit Judges.

DENNIS, Circuit Judge:

These consolidated appeals arise out of the violent collapse of the Texas A&M University bonfire stack on November 18, 1999, which killed 12 students and injured 27 others. In these appeals, plaintiffs seek to overturn the district court's grant of summary judgment under Federal Rule of Civil Procedure 56 dismissing their 42 U.S.C. § 1983 claims against University officials for damages resulting from that tragic event. In previous appeals, a panel of this court, in *Scanlan v. Texas A&M University,* 343 F.3d 533 (5th Cir. 2003), reversed the district court's dismissal of those claims under Rule 12(b)(6). Upon remand after that decision, the district court granted summary judgment in favor of defendants, holding that the University officials were entitled to qualified immunity from suit. *See Breen v. Southerland,* No. 3:01-CV-00670, slip op. (S.D. Tex. May 21, 2004). This second group of appeals followed.

I. Procedural Background

In the wake of the 1999 Texas A&M bonfire collapse, the plaintiffs, including the estates of deceased victims, injured survivors, and relatives of affected students, filed suits against Texas A&M University and certain University officials in the United States District Court for the Southern District of Texas.[1] Plaintiffs asserted, *inter alia,* that the University and its officials were liable to plaintiffs under 42 U.S.C. § 1983 for violating the students' substantive due process rights to bodily integrity. Plaintiffs' section 1983 claims were predicated on a state-created danger theory – *i.e.,* that the University and its officials created a dangerous environment for students and were deliberately indifferent to their safety by encouraging the unqualified and inexperienced students to build the enormous bonfire stack without adequate supervision by University personnel. Plaintiffs also asserted several state law causes of action against the various defendants.

Defendants moved to dismiss plaintiffs' actions for failure to state a claim, and, in the alternative, for summary judgment. For reasons assigned in an opinion dated July 23, 2002, the district court granted the defendants' motions to dismiss and dismissed plaintiffs' complaints in their entirety. *See Kimmel v. Texas A&M Univ.,* 267 F. Supp. 2d 646 (S.D. Tex. 2002). First, the district court held that plaintiffs' claims against Texas A&M University were suits against the state and were therefore barred by

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[1] The defendants in the cases on appeal before us are Dr. Ray Bowen, Dr. Zack Coapland, Major General Marvin Hopgood, Jr., Dr. Kevin Jackson, Brigadier General Donald Johnson, Dr. William Kibler, Dr. John Koldus, III, Michael Krenz, James Reynolds, Dr. J. Malon Southerland, Robert Stiteler, Jr., and Russell Thompson.

sovereign immunity. *Id.* at 653-54. No appeal was taken from that holding. Second, as to plaintiffs' section 1983 claims against the University officials, the district court held that plaintiffs failed to state a cognizable substantive due process claim because plaintiffs' allegations were insufficient to establish that the officials acted with deliberate indifference. *Id.* at 656-58. In analyzing the sufficiency of plaintiffs' section 1983 claims, the district court considered not only the allegations of plaintiffs' complaints, but also the findings of the Final Report of the Special Commission on the 1999 Texas A&M Bonfire,[2] although that document was not incorporated by or otherwise made part of plaintiffs' complaints. *Kimmel,* 267 F. Supp. 2d at 654. Finally, the district court declined to exercise supplemental jurisdiction over plaintiffs' state law claims and dismissed them without prejudice. *Id.* at 658-59.

Upon plaintiffs' first appeal in this case, a panel of this court reversed the district court's Rule 12(b)(6) dismissal of plaintiffs' section 1983 claims against the University officials. *Scanlan,* 343 F.3d at 537-39. The court first held that the district court erred by considering, for purposes of the defendants' Rule 12(b)(6) motions to dismiss, the facts stated in the Final Report.[3] The *Scanlan*

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[2] The Final Report documented the findings of a special commission convened by the president of the University to investigate the collapse of the bonfire stack. *See Scanlan,* 343 F.3d at 535.

[3] The court held that the district court erred in considering the facts stated in the Final Report because the Final Report was not attached to the defendants' motions to dismiss, the plaintiffs objected to its being considered, it was not central to plaintiffs' claims, and the plaintiffs relied on other evidence in support of their claims. *Scanlan,* 343 F.3d at 536-37.

court then considered whether the plaintiffs' allegations were sufficient to state a claim under 42 U.S.C. § 1983. The court noted that, although this circuit had never adopted the state-created danger theory, it had previously recognized that a plaintiff seeking to recover under such a theory must show that (1) "the defendants used their authority to create a dangerous environment for the plaintiff;" and (2) "the defendants acted with deliberate indifference to the plight of the plaintiff." *Id.* at 537-38. The court found that, construing the allegations in the light most favorable to the plaintiffs, the complaints stated a cause of action under the state-created danger theory because they averred that: (1) the bonfire construction environment was dangerous; (2) the University officials knew that it was dangerous and would create an opportunity for the resulting harm to occur; and (3) the officials were deliberately indifferent to the students' safety because they delegated the construction of the bonfire stack to students, whom they knew were not qualified to handle such a dangerous project, failed to provide adequate supervision, and ignored the danger that the stack posed to the students working on it. *Id.* at 538. Accordingly, the *Scanlan* court reversed the district court's judgment dismissing the plaintiffs' section 1983 claims and remanded the case to the district court for further proceedings.

On remand, the University officials renewed their motions for summary judgment. The district court granted the motions on the ground that the officials were entitled to qualified immunity from suit. *See Breen,* No. 3:01-cv-00670, slip op. at 3-11. The district court found that, although the summary judgment record contained material factual disputes concerning both whether defendants'

conduct created or increased the danger to the students involved in construction of the bonfire stack and whether defendants acted with deliberate indifference, the defendants were nevertheless entitled to qualified immunity because their conduct was not objectively unreasonable in light of clearly established Fifth Circuit law at the time of their actions. *Id.*, slip op. at 6-11.

II. Standard of Review

Summary judgment is proper where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). This court reviews a grant of summary judgment *de novo,* applying the same standards as those applicable in the district court. *Baton Rouge Oil & Chem. Workers Union v. Exxon Mobil Corp.,* 289 F.3d 373, 376 (5th Cir. 2002). Ordinarily, on summary judgment, the moving party has the initial burden of establishing that there are no issues of material fact and that it is entitled to judgment in its favor as a matter of law. *See Rivera v. Houston Indep. Sch. Dist.,* 349 F.3d 244, 246-47 (5th Cir. 2003). If the moving party meets this burden, the burden then shifts to the non-moving party to point to evidence showing that an issue of material fact exists. *Id.* at 247. When a defendant invokes qualified immunity, however, the burden shifts to the plaintiff to rebut the applicability of the defense. *See McClendon v. City of Columbia,* 305 F.3d 314, 323 (5th Cir. 2002) (en banc) (citing *Bazan ex rel. Bazan v. Hidalgo County,* 246 F.3d 481, 489 (5th Cir. 2001)). In determining whether summary judgment is appropriate, we view all of the evidence in the light most favorable to the non-moving party and draw all reasonable

inferences in its favor. *See Coleman v. Sch. Bd. of Richland Parish,* 418 F.3d 511, 515-16 (5th Cir. 2005).

III. Section 1983 and Qualified Immunity

Section 1983 provides a private right of action for damages to individuals who are deprived of "any rights, privileges, or immunities" protected by the Constitution or federal law by any person acting under the color of state law. 42 U.S.C. § 1983. Notwithstanding section 1983's broad language, state officials performing discretionary functions are often protected from liability by the doctrine of qualified immunity, which shields such officials from suit "'insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *McClendon,* 305 F.3d at 322 (quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982)).

To determine whether an official is entitled to qualified immunity from a suit alleging a constitutional violation, we conduct a familiar two-step inquiry. First, we must ask whether the plaintiff has alleged facts to establish that the official violated the plaintiff's constitutional rights. *Hope v. Pelzer,* 536 U.S. 730, 736 (2002) ("The threshold inquiry a court must undertake in a qualified immunity analysis is whether plaintiff's allegations, if true, establish a constitutional violation."); *Saucier v. Katz,* 533 U.S. 194, 201 (2001) ("A court required to rule upon the qualified immunity issue must consider, then, this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?"). Whether the facts establish a violation of a constitutional

right is determined with reference to current law. *See Atteberry v. Nocona Gen. Hosp.*, 430 F.3d 245, 253 (5th Cir. 2005); *McClendon*, 305 F.3d at 323. If the facts do not establish that the defendant violated the plaintiff's constitutional rights, we need not inquire further. *See Saucier*, 533 U.S. at 201. If they do, the defendant is still entitled to qualified immunity unless the court finds that the defendant's conduct was objectively unreasonable in light of clearly established law at the time of the state actions at issue. *See McClendon*, 305 F.3d at 323.

A. Violation of a Constitutional Right

Plaintiffs here assert that defendants violated the students' rights to bodily integrity under the substantive component of the Fourteenth Amendment's Due Process Clause by creating or exacerbating the dangerous situation that ultimately injured the students. Specifically, plaintiffs assert that defendants knew that building the bonfire stack, a recognized and sanctioned University activity, was a dangerous activity and that the student leaders were not qualified to design and supervise its construction. Plaintiffs allege that, notwithstanding that knowledge, defendants deliberately delegated the design and construction process to the students and deliberately decided not to provide the students with or require that they have adequate supervision. Plaintiffs argue that defendants' actions give rise to a cognizable substantive due process claim under the state-created danger theory.

1. Substantive Due Process and State-Created Danger

The Due Process Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The Supreme Court has long recognized that the Due Process Clause is more than a guarantee of procedural fairness and "cover[s] a substantive sphere as well, 'barring certain government actions regardless of the fairness of the procedures used to implement them.'" *County of Sacramento v. Lewis,* 523 U.S. 833, 840 (1998) (quoting *Daniels v. Williams,* 474 U.S. 327, 331 (1986)). The reach of substantive due process is limited, however, and it protects against only the most serious of governmental wrongs. The Court has emphasized that "because guideposts for responsible decision-making in this uncharted area are scarce and open-ended," courts should be "reluctant to expand the concept of substantive due process." *Collins v. City of Harker Heights,* 503 U.S. 115, 125 (1992).

When a plaintiff complains of abusive executive action, substantive due process is violated "only when [the conduct] 'can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense.'" *Lewis,* 523 U.S. at 847 (quoting *Collins,* 503 U.S. at 128). Though the meaning of the term "conscience shocking" is necessarily indeterminate, the *Lewis* court provided some guidance for lower courts to follow. Negligent acts, for example, are insufficient to trigger a substantive due process violation. *Id.* at 849 ("[L]iability for negligently inflicted harm is categorically beneath the threshold of constitutional due process."). Conversely, conduct intended to cause injury is, of course, most likely to violate due process. *Id.* For

conduct within the "middle range" of "something more than negligence but less than intentional conduct, such as recklessness or "gross negligence,"'" the inquiry is more difficult and requires a searching inquiry into the facts and circumstances of the particular case in light of the right asserted. *Id.* at 849-50 (quoting *Daniels,* 474 U.S. at 331); *see also id.* at 850 ("Deliberate indifference that shocks in one environment may not be so patently egregious in another.").

While it is clear that individuals have a substantive due process right to be free from state-occasioned bodily harm, it is equally clear that the Constitution does not, as a general matter, impose upon state officials a duty of care to protect individuals from any and all private harms. *DeShaney v. Winnebago County Dep't of Soc. Servs.,* 489 U.S. 189, 196-97 (1989) ("As a general matter, then, we conclude that a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause."). The *DeShaney* court recognized two possible exceptions to this general rule, however. First, the Court stated that the Constitution imposes upon the state a duty of care towards individuals who are in the custody of the state. *Id.* at 200 ("[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and well-being."). Second, some language from *DeShaney* has been read to suggest that state officials also have a duty to protect individuals from harm when their actions created or exacerbated a danger to the individual. *See id.* at 201 (noting that, although the state may have been aware of the dangers faced by the plaintiff, "it played no

part in their creation, nor did it do anything to render him more vulnerable to them").

This latter exception mentioned in *DeShaney* is often recognized as the primary source[4] for what has been termed the state-created danger theory. A number of courts, including the majority of the federal circuits, have adopted the state-created danger theory of section 1983 liability in one form or another.[5] Prior to the *Scanlan*

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[4] *But cf. Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1061 n.1 (9th Cir. 2006) (asserting that "the 'state-created danger' doctrine predates *DeShaney* " and that *DeShaney* is "more reasonably understood as an acknowledgment and preservation of the doctrine, rather than its source").

[5] *See, e.g., Butera v. District of Columbia*, 235 F.3d 637, 651 (D.C. Cir. 2001) (holding that "under the State endangerment concept, an individual can assert a substantive due process right to protection by the District of Columbia from third-party violence when . . . officials affirmatively act to increase or create the danger that ultimately results in the individual's harm"); *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1066-67 (6th Cir. 1998) (recognizing state-created danger claim where officials released personal information about undercover officers to the suspects whom the officers were investigating); *Kneipp v. Tedder*, 95 F.3d 1199, 1211 (3d Cir. 1996) ("[W]e hold that the state-created danger theory is a viable mechanism for establishing a constitutional claim under 42 U.S.C. § 1983."); *Uhlrig v. Harder*, 64 F.3d 567, 572 (10th Cir. 1995) (stating that "danger creation" theory is a recognized exception to *DeShaney* rule); *Reed v. Gardner*, 986 F.2d 1122, 1127 (7th Cir. 1993) (holding that "officers may be subject to suit under section 1983 if they knowingly and affirmatively create a dangerous situation for the public and fail to take reasonable preventative steps to diffuse that danger"); *Dwares v. City of New York*, 985 F.2d 94, 98-99 (2d Cir. 1993) (recognizing state-created danger claim where police officers allegedly conspired with group of "skinheads" to permit them to assault demonstrators); *Freeman v. Ferguson*, 911 F.2d 52, 54-55 (8th Cir. 1990) (recognizing state-created danger claim where police chief allegedly directed officers to ignore victim's pleas for assistance); *Wood v. Ostrander*, 879 F.2d 583, 589-90 (9th Cir. 1989) (recognizing state-created danger claim where police officers impounded vehicle, arrested driver, and left passenger stranded on roadside in high crime area).

(Continued on following page)

decision in the present group of cases, this court had often expressed reluctance to embrace the state-created danger theory, while noting its adoption by other courts. Although this court discussed the theory in no fewer than 11 published decisions prior to *Scanlan*,[6] it had not formally approved of the theory or applied it to uphold a plaintiff's complaint against pretrial motions or affirm an award of damages. *See, e.g., Morin,* 309 F.3d at 321 (noting that Fifth Circuit had "neither adopted nor rejected the state created danger theory"); *McKinney,* 309 F.3d at 313 (same). This court had, however, recognized and described the essential elements of such a claim for the purpose of demonstrating that the plaintiffs' complaints in particular

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The First and Fourth Circuits have discussed the state-created danger theory, but those courts have neither accepted nor rejected it as a theory of recovery. *See Velez-Diaz v. Vega-Irizarry,* 421 F.3d 71, 80 (1st Cir. 2005) (" 'This court has, to date, discussed the state created danger theory, but never found it actionable on the facts alleged.' ") (quoting *Rivera v. Rhode Island,* 402 F.3d 27, 35 (1st Cir. 2005)); *Pinder v. Johnson,* 54 F.3d 1169, 1175-76 (4th Cir. 1995) (en banc). The Eleventh Circuit at one point recognized the state-created danger theory, *see Cornelius v. Town of Highland Lake,* 880 F.2d 348, 354-55 (11th Cir. 1989), but it appears to have since repudiated the doctrine. *See White v. Lemacks,* 183 F.3d 1253, 1259 (11th Cir. 1999) ("[T]he 'special relationship' and 'special danger' doctrines applied in our decision in *Cornelius* are no longer good law, having been superseded by the standard employed by the Supreme Court in *Collins.*").

[6] *See Morin v. Moore,* 309 F.3d 316, 321-24 (5th Cir. 2002); *McKinney v. Irving Indep. Sch. Dist.,* 309 F.3d 308, 313-14 (5th Cir. 2002); *McClendon,* 305 F.3d at 324-26; *Piotrowski v. City of Houston,* 237 F.3d 567, 583-85 (5th Cir. 2001) ("*Piotrowski II*"); *Saenz v. Heldenfels Bros., Inc.,* 183 F.3d 389, 391-92 (5th Cir. 1999); *Randolph v. Cervantes,* 130 F.3d 727, 731 (5th Cir. 1997); *Doe v. Hillsboro Indep. Sch. Dist.,* 113 F.3d 1412, 1415 (5th Cir. 1997) (en banc); *Piotrowski v. City of Houston,* 51 F.3d 512, 517 (5th Cir. 1995) ("*Piotrowski I*"); *Johnson v. Dallas Indep. Sch. Dist.,* 38 F.3d 198, 200-02 (5th Cir. 1994); *Leffall v. Dallas Indep. Sch. Dist.,* 28 F.3d 521, 530-32 (5th Cir. 1994); *Salas v. Carpenter,* 980 F.2d 299, 309-10 (5th Cir. 1992).

cases failed to state claims under the theory. In doing so, this court explained that to recover on a state-created danger claim, the plaintiff must show that the harm to the plaintiff resulted because (1) the defendant's actions created or increased the danger to the plaintiff; and (2) the defendant acted with deliberate indifference toward the plaintiff. *See, e.g., Morin,* 309 F.3d at 321-22; *McKinney,* 309 F.3d at 313. This court had also stated that the state-created danger theory requires an identifiable victim. *See Morin,* 309 F.3d at 322-23; *Saenz,* 183 F.3d at 392.

2. Scanlan's Recognition of the State-Created Danger Theory

In most of the cases in which panels of this court had discussed the state-created danger theory, the panel, in effect, pretermitted whether to embrace or reject the theory, but held simply that the facts of the particular case were insufficient to state a claim under such a theory because the plaintiff did not adequately allege that the defendants created the danger,[7] that the defendants acted with the requisite culpability,[8] that the plaintiff was an identifiable victim,[9] or some combination thereof. In *Scanlan,* however, the panel reversed the district court's dismissal of plaintiffs' section 1983 claims in the present group of cases on the ground that plaintiffs had sufficiently

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[7] *See Morin,* 309 F.3d at 324; *McKinney,* 309 F.3d at 314; *Piotrowski II,* 237 F.3d at 584-85; *Johnson,* 38 F.3d at 202; *Salas,* 980 F.2d at 309.

[8] *See McClendon,* 305 F.3d at 326; *Piotrowski II,* 237 F.3d at 585; *Johnson,* 38 F.3d at 201-02; *Leffall,* 28 F.3d at 531.

[9] *See Morin,* 309 F.3d at 322-23; *Saenz,* 183 F.3d at 391-92.

alleged all of the elements of a state-created danger claim. *See Scanlan,* 343 F.3d at 537-39.

Given that disposition, the question naturally arises whether *Scanlan* constitutes recognition, approval, and adoption for use by this court of the state-created danger theory. Although the *Scanlan* opinion did not expressly announce that it was adopting the state-created danger theory, it explicitly recited the previously recognized essential elements of a state-created danger claim, applied them to the pleadings, and decided that the plaintiffs had stated a claim upon which relief could be granted under the theory. *See id.* Unlike the earlier cases discussed above, in which this court declined to pass upon the validity of the state-created danger theory because the plaintiff's allegations did not establish the necessary elements of such a claim, the *Scanlan* court explicitly found that plaintiffs had alleged facts sufficient to show both (1) that the defendants created or increased the danger to the students; and (2) that the defendants acted with deliberate indifference. *See id.* at 538 ("[T]he district court should have determined [that] the plaintiffs had pleaded sufficient factual allegations to show the bonfire construction environment was dangerous, the University Officials knew it was dangerous, and the University Officials used their authority to create an opportunity for the resulting harm to occur.").[10]

[10] The *Scanlan* opinion does not discuss the additional requirement that the risk of harm be to an identifiable victim, probably because defendants did not argue that the affected students were not identifiable victims. Defendants do not argue that plaintiffs have failed to establish that requirement in these appeals.

Thus, the *Scanlan* panel, unlike earlier panels of this court, was squarely faced with complaints that sufficiently alleged the elements of a state-created danger claim, and, therefore, stated claims under that theory. Consequently, the *Scanlan* court, by holding that the district court erred in dismissing plaintiffs' section 1983 claims, necessarily recognized that the state-created danger theory is a valid legal theory. Were that not the case, the *Scanlan* court would have been required to affirm the district court's dismissal of plaintiffs' complaints, notwithstanding the fact that they sufficiently alleged the elements of a state-created danger claim. Under Rule 12(b)(6), federal courts are required to dismiss claims based upon invalid legal theories even though they might otherwise be well-pleaded.[11]

Since the *Scanlan* decision, the panels in three subsequent, unrelated cases have issued opinions that contained statements suggesting that *Scanlan* did not adopt the state-created danger theory. *See Rios v. City of Del Rio,* 444 F.3d 417, 422-23 (5th Cir. 2006) (suggesting that *Scanlan* did not adopt state-created danger theory because "*nowhere* in the opinion does the court expressly purport to

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[11] As the Supreme Court stated in *Neitzke v. Williams,* 490 U.S. 319 (1989), Rule 12(b)(6) requires dismissal whenever a plaintiff's claim is based on an invalid legal theory:

> Nothing in Rule 12(b)(6) confines its sweep to claims of law which are obviously insupportable. On the contrary, if as a matter of law "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations," . . . a claim must be dismissed, without regard to whether it is based on an outlandish legal theory or on a close but ultimately unavailing one.

Id. at 327 (internal citations omitted).

approve that theory"); *Beltran v. City of El Paso,* 367 F.3d 299, 307 (5th Cir. 2004) (citing *Scanlan* for the proposition that "[t]his court has consistently refused to recognize a 'state-created danger' theory of § 1983 liability even where the question of the theory's viability has been squarely presented"); *Rivera v. Houston Indep. Sch. Dist.,* 349 F.3d 244, 249 n.5 (5th Cir. 2003) (noting of *Scanlan* that "[d]espite remanding that case to the district court for further proceedings, we did not recognize the state created danger theory"). In each of those cases, however, as in so many of this court's other state-created danger cases, the court found that, assuming, arguendo, the validity of the state-created danger theory, the plaintiff's allegations did not establish the elements of such a claim. *See Rios,* 444 F.3d at 423-25; *Beltran,* 367 F.3d at 307-08; *Rivera,* 349 F.3d at 249-50. Thus, nothing in those cases turned on whether the state-created danger theory is or is not valid in this circuit. Accordingly, the statements in those cases pertaining to *Scanlan* were unnecessary to their holdings and, as such, constituted only non-binding dicta.[12]

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[12] As Judge Posner noted, there are numerous and sometimes inconsistent definitions of dictum, but as a practical matter, a court can determine whether a particular passage in an earlier opinion is dictum by considering factors such as whether "the passage was unnecessary to the outcome of the earlier case and therefore perhaps not as fully considered as it would have been were it essential to the outcome," or whether "the passage was not an integral part of the earlier opinion, and so it was a redundant part of that opinion and, again, may not have been fully considered." *United States v. Crawley,* 837 F.2d 291, 292 (7th Cir. 1988). Under either of these formulations, the statements from *Rios, Beltran,* and *Rivera* suggesting that *Scanlan* does not represent an acceptance of the state-created danger theory, which, as noted above, were unnecessary to the outcome or analysis in those cases, clearly qualify as dicta.

The *Scanlan* panel's clearly implied recognition of state-created danger as a valid legal theory applicable to the case is the law of the case with respect to these further appeals in these same cases now before this panel. Under the law of the case doctrine, the factual findings and legal conclusions of a panel of this court continue to govern throughout that case; we will not ordinarily revisit those findings or conclusions on subsequent appeals. *See Free v. Abbott Labs., Inc.,* 164 F.3d 270, 272 (5th Cir. 1999). The doctrine "applies not only to issues decided explicitly, but also to everything decided 'by necessary implication.'" *Office of Thrift Supervision v. Felt (In re Felt),* 255 F.3d 220, 225 (5th Cir. 2001) (citing *Browning v. Navarro,* 887 F.2d 553, 556 (5th Cir. 1989)). Although the law of the case does not absolutely bind later panels, we will generally apply it unless (1) the evidence is materially different on the later appeal; (2) there has been a change in controlling law on the applicable issues; or (3) the initial decision was clearly erroneous and adhering to it would result in manifest injustice. *Free,* 164 F.3d at 272.

Because the necessary implication of the *Scanlan* court's decision is that the state-created danger theory is, indeed, a valid basis for a claim on the set of facts alleged in the complaints in these cases, that clear implied holding is the law of the case in the present group of appeals. Moreover, as none of the exceptions to the law of the case doctrine even arguably applies here, this panel cannot justifiably revisit that conclusion.

3. Did the University Officials' Conduct Violate the Students' Substantive Due Process Rights in this Case?

Because *Scanlan* established that plaintiffs have a substantive due process right to be free from bodily injuries caused by state-created dangers on the facts alleged in plaintiffs' complaints, we next must determine whether, viewing the summary judgment evidence in the light most favorable to plaintiffs, there is an issue of material fact as to whether the defendants' conduct violated that right. *See Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 613 (5th Cir. 2004) ("When reviewing a grant of summary judgment based on qualified immunity, we must first determine whether a plaintiff successfully alleged facts showing the violation of a constitutional right by state officials, and whether there is a genuine issue of material fact that the violation occurred."). The district court held that issues of fact precluding summary judgment existed on both prongs of plaintiffs' state-created danger claims. As to the first prong – that defendants created or increased the danger to the plaintiffs – the district court found as follows:

> Plaintiffs ultimately allege that the University Officials increased the danger to the victims by affirmatively delegating technical and complex Bonfire responsibilities to unqualified students without adequate supervision or guidelines. Defendants maintain that they "passively continued the status quo" and merely permitted students to do what they wanted. The resolution of these polar viewpoints requires examination of literally hundreds of facts. It would be inappropriate and virtually impossible for the Court to decide as a matter of law and based on the record now before the court whether the state actors increased the danger to the Bonfire victims.

Breen, No. 3:01-cv-00670, slip op. at 6-7. With respect to deliberate indifference, the district court took its guidance from *Scanlan*:

> In its Opinion in this case, the Fifth Circuit stated: "Whether deliberately delegating the construction of the bonfire stack to students the University Officials allegedly knew were not qualified to handle such a dangerous project, and whether deliberately providing no supervision to students building the bonfire even though they knew the students were not qualified to build the stack, constituted deliberate indifference presents fundamental questions of material fact." *Scanlan,* 343 F.3d at 539. Though this statement was made in an opinion disposing of Defendants' Motion to Dismiss, the summary judgment evidence submitted since then has only muddied the waters further. At this stage in the proceedings, there remain multiple questions of fact as to whether Defendants acted with deliberate indifference.

Id., slip op. at 8.

We agree with the district court that *Scanlan* essentially disposes of this first prong of the qualified immunity inquiry. *Scanlan* quite clearly held that plaintiffs' allegations, if proven, would state a section 1983 claim under the state-created danger theory. *Scanlan,* 343 F.3d at 539. The *Scanlan* court also, however, went on to state that the conflicting summary judgment evidence submitted by the parties in the district court presented material fact issues concerning plaintiffs' state-created danger claims. *See id.* ("Had the district court [converted the motion to dismiss into a motion for summary judgment], the court would have been faced with the questions of fact the evidence

presents."); *id.* (noting existence of "fundamental questions of material fact"); *id.* ("If *all* of the summary judgment evidence presents genuine issues of material fact, those roles should be decided by a trier of fact, not the defendants themselves."). The *Scanlan* court's statements about the summary judgment evidence are technically dicta and thus not the law of the case, but its view of the summary judgment evidence in the record at the time of its decision is nevertheless instructive. Although the parties supplemented the summary judgment record with some additional evidence on remand, as the district court noted, the material factual disputes identified in *Scanlan* remain concerning both whether defendants' actions increased the danger to the students and whether defendants acted with deliberate indifference. We therefore conclude that plaintiffs successfully alleged facts showing the violation of a constitutional right by state officials under the state-created danger theory, and that there is a genuine issue of material fact that the violation occurred.

B. Clearly Established Law

Defendants in section 1983 cases are nevertheless entitled to qualified immunity from a plaintiff's claims unless their conduct was objectively unreasonable in light of the clearly established law at the time of their actions. *McClendon,* 305 F.3d at 323. The district court granted defendants' motions for summary judgment because it found that the state-created danger theory was not clearly established law in the Fifth Circuit as of November 18, 1999, the date on which the bonfire stack collapsed.

Whether a right is clearly established depends, to a large extent, on the level of generality at which the right

in question is defined. *McClendon,* 305 F.3d at 330-31. In the qualified immunity context, a constitutional right is clearly established only if, at the time of an official's challenged conduct, the contours of the right in question are "'sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Hope,* 536 U.S. at 739 (quoting *Anderson v. Creighton,* 483 U.S. 635, 640 (1987)). The essence of the clearly established law requirement is that a defendant is entitled to "fair notice" that his conduct violates the plaintiff's constitutional rights. *See id.* at 739-40. Thus, although the relevant right must be defined with sufficient specificity to provide the official with notice of the unlawfulness of his conduct, "the term clearly established does not necessarily refer to commanding precedent that is factually on all-fours with the case at bar, or that holds the very action in question unlawful." *Atteberry,* 430 F.3d at 256-57 (internal citations and quotation marks omitted).

In determining whether a right is clearly established, we are not limited to precedent from the Supreme Court or this court. As we have recognized, a right can become clearly established either through cases that constitute binding authority or on the basis of a consensus of persuasive cases from other jurisdictions. *See McClendon,* 305 F.3d at 329 ("In light of *Wilson* [*v. Layne,* 526 U.S. 603 (1999)], we must consider both this court's treatment of the state-created danger theory and the status of this theory in our sister circuits. . . .").

The starting point for our consideration of whether the state-created danger theory was clearly established in a particularized sense relevant here on or before November 18, 1999, the date of the bonfire stack's collapse, is our 2002 en banc decision in *McClendon,* which considered a

state-created danger claim arising out of an injury that occurred in 1993. In *McClendon,* this court concluded that the state-created danger theory was not clearly established law in the Fifth Circuit in 1993. The *McClendon* court first noted that this court had only considered the state-created danger theory once prior to 1993, in *Salas v. Carpenter,* 980 F.2d 299 (5th Cir. 1992), and that *Salas* "did not address the viability of the state-created danger theory or define the contours of an individual's right to be free from state-created dangers." *McClendon,* 305 F.3d at 330. The court therefore found that *Salas* was, on its own, "certainly insufficient" to provide a defendant in 1993 with the requisite notice that his conduct violated the plaintiff's substantive due process rights. *Id.*

The *McClendon* court then proceeded to consider the relevant authority from other circuits. The court observed that "six circuits had sanctioned some version of the state-created danger theory in July of 1993" and that no circuit had, to that point, expressly rejected the theory. *Id.* Despite this apparent consensus, this court found that "the mere fact that a large number of courts had recognized the existence of a right to be free from state-created danger in some circumstances" was insufficient to make the theory clearly established in the Fifth Circuit, in part because there was little agreement among those courts as to the specific contours of that right. *Id.* at 330-32 ("[W]hile a number of our sister circuits had accepted some version of the state-created danger theory as of July of 1993, given the inconsistencies and uncertainties within this alleged consensus of authorities, an officer acting within the jurisdiction of this court could not possibly have assessed whether his or her conduct violated this right in the absence of explicit guidance from this court or the

Supreme Court."). The en banc court in *McClendon* also found it significant that none of the cases from other circuits applying the state-created danger theory had done so in a factual context similar to that case. *Id.* at 332.

Applying the principles of *McClendon* to this case, we conclude that the state-created danger theory was not clearly established law in this circuit, with respect to the specific facts here or otherwise, by November 18, 1999, and, accordingly, the defendants are entitled to qualified immunity from plaintiffs' section 1983 claims. As was the case in 1993, the relevant date in *McClendon,* neither the Supreme Court nor this court had expressly recognized the validity of the state-created danger theory as applied to any case prior to November 1999. Plaintiffs do not claim otherwise. Rather, they argue that the state-created danger theory was clearly established in the Fifth Circuit by November 1999 because (1) between 1993 and 1999, this court discussed the state-created danger theory, and set out the necessary elements of the theory as it had been recognized by other circuits, on numerous occasions; and (2) the state-created danger theory was clearly established in certain respects in the majority of the federal circuits by November 1999.

In light of this court's historical reticence towards adopting the state-created danger theory, however, neither this court's discussions of the theory nor our sister circuits' adoption of it convinces us that a reasonable official in any of the defendants' shoes would have had fair notice on or before November 18, 1999 that his conduct with respect to the danger created by the Texas A&M bonfire stack could violate the students' constitutional rights. Plaintiffs are correct that a number of this court's decisions prior to 1999 spelled out the basic and

essential elements that a plaintiff would need to establish in order to state a claim under the state-created danger theory, if it were to be adopted. *See Randolph,* 130 F.3d at 731; *Doe,* 113 F.3d at 1415; *Piotrowski I,* 51 F.3d at 515-16; *Johnson,* 38 F.3d at 201; *Leffall,* 28 F.3d at 530-31. In each of those cases, however, this court also expressly noted that the theory had never been adopted in this circuit. *See Randolph,* 130 F.3d at 731; *Doe,* 113 F.3d at 1415; *Piotrowski I,* 51 F.3d at 515; *Johnson,* 38 F.3d at 201; *Leffall,* 28 F.3d at 530. Because this court's pre-November 1999 decisions evince substantial uncertainty as to the existence of even the general right that the plaintiffs claim has been violated, those decisions cannot be said to have given defendants fair warning that any of their actions or omissions with respect to the 1999 Texas A&M bonfire construction could violate the affected students' constitutional rights.

Moreover, similar to the situation in *McClendon,* any consensus of the other federal circuits in adopting various formulations of the state-created danger theory is insufficient for this court to find that the theory was clearly established in this circuit as applied to these cases. Although a majority of federal circuits had approved of the state-created danger theory in a general sense by November 18, 1999, there was not a consensus among those courts as to the contours of the underlying substantive due process right, *see McClendon,* 305 F.3d at 331, *Butera,* 235 F.3d at 653-54, and the plaintiffs have not pointed to (and this court has not found) any pre-collapse cases in which an appellate court applied the state-created danger theory on facts even remotely analogous to the facts of these cases. Accordingly, we find that the adoption of the state-created danger theory in other circuits before November

1999 was insufficient to give the University officials fair notice that their conduct violated the students' constitutional rights.[13]

We therefore conclude that the state-created danger theory was not clearly established law in the Fifth Circuit on November 18, 1999, and defendants are entitled to qualified immunity.[14]

IV. Conclusion

For these reasons, we conclude that defendants are entitled to qualified immunity from suit based on plaintiffs' section 1983 claims, and we therefore AFFIRM the

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[13] Where this court has previously spoken on, and refrained from deciding, an issue, a consensus of authority from other jurisdictions would likely need to be particularly strong and clear before it could support a finding that the legal principle in question was clearly established law in this circuit. *See McClendon,* 305 F.3d at 332 n.12.

[14] As our finding that the state-created danger theory was not clearly established in this circuit at the time of the defendants' conduct would be the same whether or not plaintiffs established that defendants' conduct violated their constitutional rights, one might reasonably suggest that we could simply have proceeded directly to the determinative second step of the qualified immunity inquiry. The Supreme Court has made it clear, however, that courts considering qualified immunity defenses ordinarily should address the issue of clearly established law *only* if the plaintiff's allegations establish a constitutional violation. *Lewis,* 523 U.S. at 841 n.5. The reason for this rule is, at least in part, because "if the policy of avoidance were always followed in favor of ruling on qualified immunity whenever there was no clearly settled constitutional rule of primary conduct, standards of official conduct would tend to remain uncertain, to the detriment of both officials and individuals." *Id.*

summary judgment of the district court dismissing plaintiffs' complaints.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No.: 02-41166

HOWARD SCANLAN; DENISE SCANLAN;
and LAUREN SCANLAN;

Plaintiffs/Appellants;

versus

TEXAS A&M UNIVERSITY; ET AL,
Defendant;

TEXAS A&M UNIVERSITY;
J. MALON SOUTHERLAND, in his individual capacity;
RUSSELL THOMPSON, in his individual capacity;
RAY BOWEN, in his individual capacity;
WILLIAM L. KIBLER, in his individual capacity; and
JOHN J. KOLDUS, III, in his individual capacity,

Defendants/Appellees.

No.: 02-41173

(Filed Aug. 19, 2003)

SEAN BREEN, as Administrator of the Estate of
Christopher Breen; CHRISTOPHER BREEN;
JOHN E. BREEN; MARIAN K. BREEN;

Plaintiffs/Appellants;

versus

TEXAS A&M UNIVERSITY;
J. MALON SOUTHERLAND, in his individual capacity;
RUSSELL THOMPSON, in his individual capacity;
RAY BOWEN, in his individual capacity;

Defendants/Appellees.

No.: 02-41187

JAMES KIMMEL, as Representative of the Estate of Lucas Kimmel; JAMES KIMMEL;
WALIETA KIMMEL;

Plaintiffs/Appellants;

versus

TEXAS A&M UNIVERSITY; ET AL,
Defendants;

TEXAS A&M UNIVERSITY;
J. MALON SOUTHERLAND, in his individual capacity;
RUSSELL J. THOMPSON, in his individual capacity;
RAY BOWEN, in his individual capacity;
WILLIAM L. KIBLER, in his individual capacity; and
JOHN J. KOLDUS, in his individual capacity,

Defendants/Appellees.

No.: 02-41204

JACQUELYNN KAY SELF, Individually and as Administratrix of the Estate of Jerry Don Self, Deceased; KATHY MCCLAIN ESCAMILLA, Individually and as Administratrix of the Estate of Bryan A. McClain, Deceased; PHIL R. MCCLAIN; ANDREA HEARD, Individually and as Administratrix

of the Estate of Christopher Lee Heard, Deceased; LESLIE G. HEARD; ANTHONY POWELL, Individually and as Administrator of the Estate of Chad D. Powell, Deceased; BEVERLY JILL POWELL; MATTHEW ROBINS; DOMINIC BRAUS; and NANCY BRAUS;

Plaintiffs/Appellants,

versus

TEXAS A&M UNIVERSITY; ET AL,
Defendants;

TEXAS A&M UNIVERSITY; RAY BOWEN; J. MALON SOUTHERLAND; WILLIAM L. KIBLER; RUSSELL W. THOMPSON; JOHN J. KOLDUS, III; M.T. HOPGOOD, JR., Major General; DONALD J. JOHNSON; ZACK COAPLAND; KEVIN JACKSON; JAMES R. REYNOLDS; ROBERT HARRY STITELER, JR.; and MICHAEL DAVID KRENZ;

Defendants/Appellees.

No.: 02-41222

JOHN ANDREW COMSTOCK and DIXIE ANN ZINNEKER;
Plaintiffs/Appellants;

versus

TEXAS A&M UNIVERSITY; ET AL,
Defendants,

TEXAS A&M UNIVERSITY;
J. MALON SOUTHERLAND, in his individual capacity;
RUSSELL THOMPSON, in his individual capacity;
RAY BOWEN, in his individual capacity;

Defendants/Appellees

No.: 02-41244

BILL DAVIS,

Plaintiff/Appellant;

versus

TEXAS A&M UNIVERSITY; ET AL,
Defendants,

TEXAS A&M UNIVERSITY;
J. MALON SOUTHERLAND, in his individual capacity;
RUSSELL THOMPSON, in his individual capacity;
RAY BOWEN, in his individual capacity;
WILLIAM L. KIBLER, in his individual capacity; and
JOHN J. KOLDUS, III, in his individual capacity,

Defendants/Appellees.

Appeals from the United States District Court
for the Southern District of Texas

Before WIENER, CLEMENT and PRADO, Circuit Judges.

PRADO, Circuit Judge.

The above numbered and styled appeals arise from six lawsuits filed in the Southern District of Texas by, and on behalf of, those injured and killed during the Texas A&M

University bonfire disaster that occurred on November 18, 1999. The district court dismissed all of the plaintiffs' claims and entered a final judgment in each lawsuit. The plaintiffs appealed to challenge the dismissal orders. After considering the parties' arguments on appeal, this Court reverses the district court's judgments.

Background Facts

On November 18, 1999, the Texas A&M University bonfire stack collapsed, killing 12 students and injuring another 27. After the accident, the president of Texas A&M University (the University) convened a special commission to investigate the collapse. The investigating commission documented its findings and conclusions in the Final Report of the Special Commission on the 1999 Texas A&M Bonfire (Final Report). Subsequently, the appellants filed six lawsuits. In the lawsuits, the plaintiffs alleged section 1983 claims under the state-created danger theory and various state law claims against the University and various University officials (the University Officials) whom the plaintiffs hold responsible for their injuries.

From the outset, the district court limited discovery to the issue of qualified immunity. The district court allowed five weeks to conduct discovery on that issue and set the deadline for dispositive motions four weeks later. Eight weeks after the deadline for dispositive motions, the district court issued the orders challenged in these appeals, dismissing all of the plaintiffs' claims. The court issued the same order in each case.

The district court's orders were quite clear. The court first dismissed the plaintiffs' claims against the University

as a state entity on Eleventh Amendment immunity grounds. No plaintiff appeals that action.

Next, the district court adopted the Final Report and determined the actions of the University Officials did not, as a matter of law, rise to the level of deliberate indifference. Based on that determination, the district court dismissed the plaintiffs' section 1983 claims against the University Officials for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Each plaintiff challenges that action.

The district court then declined to exercise supplemental jurisdiction over the plaintiffs' state law claims and dismissed those claims without prejudice. No plaintiff appeals that action.

The Plaintiffs' Issues on Appeal

The plaintiffs' issues on appeal can be summarized as follows: (1) Whether the district court erred by relying on documents outside the complaints to determine the plaintiffs failed to state a claim, and (2) whether the district court erred by dismissing the plaintiffs' claims against the University Officials for failure to state a claim. This Court reviews the district court's dismissal under Rule 12(b)(6) *de novo,* taking the allegations of the complaint to be true. *See Vander Zee v. Reno,* 73 F.3d 1365, 1368 (5th Cir. 1996); *Eason v. Holt,* 73 F.3d 600, 601 (5th Cir. 1996).

Rule 12(b)(6)

Rule 12(b)(6) authorizes dismissal of a complaint for "failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). The district court can grant a

motion to dismiss only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *See Leffall v. Dallas Indep. Sch. Dist.,* 28 F.3d 521, 524 (5th Cir. 1994). Accordingly, this Court has consistently disfavored dismissal under Rule 12(b)(6). *See Hall v. Thomas,* 190 F.3d 693, 696 (5th Cir. 1999); *Mahone v. Addicks Utility Dist. of Harris County,* 836 F.2d 921, 926 (5th Cir. 1988). In determining whether to grant a motion to dismiss, the district court must not go outside the pleadings and must accept all well-pleaded facts as true, viewing those facts most favorably to the plaintiff. *See Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974); *Khurana v. Innovative Health Care Sys., Inc.,* 130 F.3d 143, 147 (5th Cir. 1997); *Capital Parks, Inc. v. Southeastern Adver. & Sales Sys., Inc.* 30 F.3d 627, 629 (5th Cir. 1994).

Although the district court may not go outside the complaint, this Court has recognized one limited exception. In *Collins v. Morgan Stanley Dean Witter,* 224 F.3d 496, 498-99 (5th Cir. 2000), this Court approved the district court's consideration of documents attached to a motion to dismiss. In that case, the district court relied on an agreement and an assessment about a potential merger between two companies in determining the contract was not intended to benefit the plaintiffs/stock option holders. *See Collins v. Morgan Stanley Dean Witter,* 60 F.Supp.2d 614 (S.D. Tex. 1999). The fact that the plaintiffs did not object to, or appeal, the district court's consideration of those documents was central to this Court's approval of that practice. *See Collins,* 224 F.3d at 498-99 (5th Cir. 2000). In approving the district court's consideration of the documents attached to the motion to dismiss, this Court restricted such consideration to documents that are

referred to in the plaintiff's complaint and are central to the plaintiff's claim. *Id.*

Whether the District Court Erred By Relying on the Final Report

The district court relied on *Collins* as its authority to consider the Final Report in dismissing the plaintiffs' claims. Like *Collins,* the plaintiffs in the instant case referred to the Final Report in their complaints. But unlike *Collins,* the University Officials did not attach the Final Report to their motion to dismiss. Instead, the University Officials quoted portions of the Final Report in their motions and provided an Internet cite. As a result, the district court had to seek out the report in order to consider it in making the factual determinations that served as the basis of the court's conclusion about deliberate indifference.

The University Officials maintain on appeal that because they provided the Internet citation for the report, and because the report is appropriate for judicial notice under Rule 201 of the Federal Rules of Evidence, the plaintiffs had sufficient notice of the document so that it was not necessary for the University Officials to attach it to their motion to invoke the *Collins* exception. The district court's order, however, does not indicate the court took judicial notice of the report. Even if the district court had taken judicial notice of the report, that action would have been improper because "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot

reasonably be questioned." FED. R. EVID. 201(b). The Final Report cannot be characterized as generally known within the Southern District of Texas or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Instead, the Final Report is essentially a defendant-created report that focuses on the causes of the bonfire collapse and thanks at least one of the University Officials for supporting the special commission's efforts to investigate the disaster.

In addition to the Final Report not being attached to the motion, the plaintiffs did not accept the Final Report as true in district court, and complain about the district court's consideration of the Final Report on appeal. Notably, the Scanlan plaintiffs, the Breen plaintiffs, the Kimmel plaintiffs and Plaintiff Bill Davis objected to the Court's reliance on *Collins* in their response to the defendants' motion for summary judgment. These plaintiffs distinguished *Collins* from their case stating,

> *Collins* is unlike the present case in many respects: (1) the Commission Report was not attached to the Motion to Dismiss; (2) the Commission Report refers to, incorporates and includes numerous other documents that have not been presented to the Court or referenced by Plaintiffs; (3) the Commission Report, while insightful, is not central to the Plaintiffs' claims; and (4) the other documents contained on the website referenced in Defendants' Motion are not even mentioned by Plaintiffs in their complaint.

Although the plaintiffs rely on the Final Report in their complaints, certainly the report alone is not central to their claims. Indeed, it is much more central to the University Officials' defenses. The plaintiffs rely on substantial, other

evidence to support their claims.[1] Consequently, the district court's first error was going outside the plaintiffs' complaints and considering the Final Report. Even if the Final Report fell under the *Collins* exception, the district court failed to construe the plaintiffs' factual allegations in the light most favorable to the plaintiffs.

Construing the Allegations in the Plaintiffs' Favor

Although this Court has never explicitly adopted the state-created danger theory, the Court set out the elements of a state-created danger cause of action in *Johnson v. Dallas Independent School District,* 38 F.3d 198 (5th Cir. 1994). In *Johnson,* the Court explained that a plaintiff must show the defendants used their authority to create a dangerous environment for the plaintiff and that the defendants acted with deliberate indifference to the plight of the plaintiff. *See Johnson,* 38 F.3d at 201. Later, the Court explained what is required to establish deliberate indifference. In *Piotrowski v. City of Houston,* the Court explained that to establish deliberate indifference, the plaintiff must show the "environment created by the state actors must be dangerous; they must know it is dangerous; and . . . they must have used their authority to create an opportunity that would not otherwise have existed for the third party's crime to occur." *Piotrowski v. City of Houston,* 237 F.3d 567, 585 (5th Cir. 2001) (quoting *Johnson v. Dallas Indep. Sch. Dist.*). Even a cursory review of the

[1] Although the Self plaintiffs and Comstock plaintiffs did not specifically object to the *Collins* exception, those plaintiffs presented substantial summary judgment evidence that placed the district court on notice that they were relying on much more than the Final Report.

complaints shows the plaintiffs pleaded facts to establish deliberate indifference.

The plaintiffs filed a very similar complaint in each of the underlying lawsuits. In the complaints, the plaintiffs discussed how the bonfire grew over the years from a pile of burning trash to a structure weighing over 3 million pounds. The plaintiffs asserted that the defendants were well aware of the dangers posed by the construction of the bonfire stack and that it had been characterized by one of the University Officials as the "most serious risk management activity at the University." The plaintiffs further asserted that:

> The Defendants however, did not use their control to see that the Bonfire stack was built in a safe manner. Instead, they allowed the Bonfire to grow into a massive, complex and dangerous structure. The Defendants, through their action and inaction, created a terrible peril that clearly could not, and should not, have been designated and built solely by students.

The plaintiffs claimed that the University Officials "created this dangerous condition. They knew it was dangerous. Despite that, they like ostriches, put their heads in the sand and pretended the peril did not exist."

The plaintiffs explained that the defendant had a vested interest in keeping their heads in the sand and not exercising supervision over the bonfire because they "used the Bonfire experience and tradition as a huge marketing tool to lure prospective students to A&M as well as to secure millions of dollars in donations from alumni." The plaintiffs went on to claim that the University Officials "actively encouraged and enticed students and alumni to

work on the Bonfire stack while they turned a blind eye to the peril."

In stating their section 1983 claims, the plaintiffs included the language "deliberate indifference" to describe a particular University Official's conduct. Although the plaintiffs relied on the Final Report for their characterization of the danger posed by the bonfire, the introductory paragraph of five of the complaints makes it clear that the plaintiffs rely on more than the Final Report. In that paragraph, the plaintiffs allege that "despite clear and overwhelming evidence of their culpability, including, *but not limited to,* the independent Bonfire Commission's ("Commission") Report, the Defendants have failed to take or accept any responsibility whatsoever." (emphasis added).

If these allegations were construed in the light most favorable to the plaintiff, the district court should have determined the plaintiffs had pleaded sufficient factual allegations to show the bonfire construction environment was dangerous, the University Officials knew it was dangerous, and the University Officials used their authority to create an opportunity for the resulting harm to occur. As a result, the district court should have concluded that the plaintiffs stated a section 1983 claim under the state-created danger theory.

If the district court was going to consider the Final Report, the court should have converted the motion to dismiss to a motion for summary judgment, given the parties notice, and then considered all of the evidence presented.[2] *See* FED. R. CIV. P. 12(b)(6). Had the district

[2] Apparently, most of the plaintiffs saw the hand-writing on the wall. In their responses to the defendants' motions to dismiss, the

(Continued on following page)

court done that, the court would have been faced with the questions of fact the evidence presents. Indeed, the introductory paragraphs of five complaints clearly indicate the plaintiffs are relying on more than the Final Report as evidence for their claims.

By simply adopting the Final Report as the basis for determining the University Officials did not act with deliberate indifference, the district court deferred to a defendant-created commission rather than presenting the questions of material fact to a trier of fact. Whether deliberately delegating the construction of the bonfire stack to students the University Officials allegedly knew were not qualified to handle such a dangerous project, and whether deliberately providing no supervision to students in building the bonfire even though they knew the students were not qualified to build the stack, constituted deliberate indifference presents fundamental questions of material fact. Oddly, the district court acknowledged in a footnote that the existence of deliberate indifference is often a factual determination, but stated

> because the Final Report affirmatively discloses that the University Officials in this case lacked the requisite culpability with respect to the

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Scanlan plaintiffs, the Breen plaintiffs, the Kimmel plaintiffs, and Plaintiff Bill Davis objected to the defendants' reliance on the Final Report. In particular, these plaintiffs asserted that because the defendants were relying on facts and documents not contained within the pleadings, the Court must convert the motion to dismiss to a motion for summary judgment, and asserted that they were entitled to discover evidence central to their claims before the Court ruled on the motion to dismiss. Although the Self plaintiffs and the Comstock plaintiffs did not make this particular objection, they presented substantial summary judgment evidence that placed the district court on notice that plaintiffs were relying on much more than the Final Report.

> alleged violation of the Bonfire victims' constitutional rights, it is not only appropriate, but mandatory in this instance to conclude that the University Officials failed to act with deliberate indifference, as a matter of law.

Although the district court stated in its orders that "the Parties have accepted the Final Report," most of the plaintiffs objected to the district court's reliance on the Final Report in their responses to the defendants' motions for summary judgment. In particular, the Scanlan plaintiffs, the Breen plaintiffs, the Kimmel plaintiffs, the Self plaintiffs, and Plaintiff Bill Davis complained:

> The Defendants assert that the Plaintiffs have accepted the Commission's final [sic] Report and findings. (State's Brief, p. 2.) That statement is untrue and the Defendants have cited no support for that position. The Plaintiffs, however, are entitled to rely on portions of the Report as admissions by the Defendants as it is essentially an A&M report and has been adopted by the Defendants.

Certainly, reasonable minds could differ about the Final Report's conclusions about the University Officials' roles in the collapse of the bonfire stack. If *all* of the summary judgment evidence presents genuine issues of material fact, those roles should be decided by a trier of fact, not the defendants themselves. Consequently, the district court erred because it went outside the complaints and did not construe the plaintiffs' allegations in favor of the plaintiffs.

Conclusion

Because the district court erred in dismissing the plaintiffs' claims against the University Officials, the

Court REVERSES the district court's judgments and REMANDS the cases to the district court for further proceedings consistent with this opinion.

REVERSED and REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

BILL DAVIS Plaintiff, v. J. MALON SOUTHERLAND, et al., Defendants.	§ § § § § § § § §	CIVIL ACTION NO. G-01-720

FINAL JUDGMENT

(Entered May 21, 2004)

Pursuant to the Court's Order Granting Defendants' Renewed Motion for Summary Judgment, entered this date, all claims brought by Plaintiff against Defendants are hereby **DISMISSED WITH PREJUDICE.** All relief not herein provided is expressly **DENIED.** All Parties are **ORDERED** to bear their own costs, attorneys' fees, and expenses incurred herein to date. **THIS IS A FINAL JUDGMENT.**

IT IS SO ORDERED

DONE this 20th day of May 2004, at Galveston, Texas.

/s/ Samuel B. Kent
SAMUEL B. KENT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

BILL DAVIS Plaintiff, v. J. MALON SOUTHERLAND, et al., Defendants.	§ § § § § § § §	CIVIL ACTION NO. G-01-720

ORDER GRANTING DEFENDANTS' RENEWED MOTION FOR SUMMARY JUDGMENT

(Entered May 21, 2004)

This lawsuit arises out of the tragic collapse of the Texas A & M Bonfire ("Bonfire") in the early hours of November 18, 1999, which killed twelve students and injured an additional twenty-seven. Now before the Court comes the Defendants' Renewed Motion for Summary Judgment. Because Defendants are entitled to qualified immunity from suit, the Motion is hereby **GRANTED**.

I. Background

The facts of this case have previously been laid out by this Court and the Fifth Circuit, and the Court will not repeat them in this Order. This action is one of six virtually identical lawsuits[1] now pending before the Court.

[1] The Court is issuing this Order in all six lawsuits, which are styled as *Breen v. Tex. A & M Univ., et al.*, No. G-01-CV-270 (S.D. Tex. filed Oct. 24, 2001); *Comstock v. Tex. A & M Univ., et al.*, No. G-01-CV-730 (S.D.

(Continued on following page)

Plaintiffs allege that various former and present high-level employees of Texas A & M University[2] ("University Officials" or "Defendants") deprived the Bonfire victims of their Fourteenth Amendment right to substantive due process by acting with deliberate indifference to the state-created danger that killed or injured them. Plaintiffs further alleged violations of Texas law. In an Order dated July 23, 2002, the Court dismissed all of Plaintiffs' federal claims pursuant to Fed. R. Civ. P. 12(b)(6). The Court declined to exercise supplemental jurisdiction over

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Tex. filed Nov. 19, 2001); *Davis v. Tex. A & M Univ. et al.*, No. G-01-CV-720 (S.D. Tex. filed Nov. 16, 2001); *Kimmel v. Tex A & M Univ., et al.*, No. G-01-CV-719 (S.D. Tex. filed Nov. 16, 2001); *Scanlan v. Tex. A & M Univ.*, et al., No. G-01-CV-733 (S.D. Tex. filed Nov. 19, 2001); and *Self et al. v. Tex. A & M Univ., at al.*, No. G-01-CV-721 (S.D. Tex. filed Nov. 16, 2001). The Plaintiffs are, in *Breen*, the brother/administrator and parents of Christopher Breen, a former student killed in the collapse; in *Comstock*, John Andrew Comstock, the most severely injured surviving victim of the collapse, and his mother; in *Davis*, Bill Davis, one of the students injured in the collapse; in *Kimmel*, the estate and parents of Lucas Kimmel, one of the students killed in the collapse; in *Scanlan*, Lauren Scanlan, one of the students injured in the collapse, and her parents; and in *Self*, the mother/administrator of Jerry Don Self (student killed), the mother/administrator and father of Bryan McClain (student killed), the father/administrator and mother of Christopher Lee Heard (student killed), the father/administrator and mother of Chad Powell (student killed), Matthew Robbins (student injured), Dominic Braus (student injured) and his mother. In all, these six suits represent eleven (six killed, five injured) of the thirty-nine total victims of the Bonfire collapse.

[2] The University Officials include: Russell Thompson; Dr. J. Malon Southerland; Dr. William Kibler; Dr. John J. Koldus, III; Dr. Ray M. Bowen; Dr. Kevin Jackson; Dr. Zack Coapland; Maj. Gen. M.T. Hopgood; Brig. Gen. Don Johnson; Maj. Rebecca Ray; Jim Reynolds; Robert Harry Stiteler; and Michael Krenz. Only Thompson, Bowen, and Southerland are named as Defendants in all six suits. The remaining individuals are named as Defendants in *Self* only, or *Self* and *Comstock*. The Court will hereinafter refer to the University Officials as "Defendants".

Plaintiffs' state-law claims, and the dismissal of those claims without prejudice was not appealed. Plaintiffs' claims against the University were dismissed on Eleventh Amendment immunity grounds, and no Plaintiff appealed that ruling. Plaintiffs' claims against the University Officials were dismissed after a determination that their actions did not rise to the level of deliberate indifference as a matter of law. It is that ruling that was appealed to the United States Court of Appeals for the Fifth Circuit. On August 19, 2003, the Fifth Circuit reversed this Court's findings as to the University Officials and remanded the case for further consideration consistent with its instructions. *See Scanlan v. Tex. A & M Univ.*, 343 F.3d 533 (5th Cir. 2003). The Court of Appeals found that this Court impermissibly relied upon the Final Report of the Special Commissioners on the 1999 Texas A & M Bonfire ("the Final Report"). *See id.* at 538. The Circuit found that without consideration of the Final Report, and construing allegations in a light most favorable to Plaintiffs, the University Officials were not entitled to a dismissal of the claims against them. *See id.* Upon remand, Plaintiffs renewed their Motions for Summary Judgment, which were originally filed in May of 2002. After additional, substantial briefing by both sides, those Motions are now ripe for consideration.

II. Summary Judgment Standard

Summary judgment is appropriate if no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986). When one party moves for summary judgment, the nonmoving party must

set forth specific facts showing that there is a genuine issue for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). Issues of material fact are "genuine" only if they require resolution by a trier of fact. *See id.* at 248, 106 S.Ct. 2510. The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; rather, only disputes over facts that might affect the outcome of the lawsuit under governing law will preclude the entry of summary judgment. *See id.* at 247-48, 106 S.Ct. 2510. Nevertheless, if the evidence is such that a reasonable fact-finder could find in favor of the nonmoving party, summary judgment should not be granted. *See id.*; *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356. 89 L.Ed.2d 538 (1986). Determining credibility, weighing evidence, and drawing reasonable inferences are left to the trier of fact. *See Anderson*, 477 U.S. at 255, 106 S.Ct. 2513.

III. Qualified Immunity Standard

The University Officials assert that they are entitled to qualified immunity against suit, and the claims against them should be dismissed. "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). "When a defendant invokes qualified immunity, the burden is on the plaintiff to demonstrate the inapplicability of the defense." *McClendon v. City of Columbia*, 305 F.3d 314, 323 (5th Cir.

2002). The University Officials' right to qualified immunity should be determined through the application of a two-prong test. *See Saucier v. Katz*, 533 U.S. 194, 200, 121 S.Ct. 2151, 2155, 150 L.Ed.2d 272 (2001); *Mace v. City of Palestine*, 333 F.3d 621, 623 (5th Cir. 2003). The first question is whether the facts alleged, considered in a light most favorable to Plaintiffs, show that the University Officials' conduct violated a constitutional right. *Mace*, 333 F.3d at 623. If so, the Court must determine whether that right was clearly established at the time it was violated. That is, would it have been clear to a reasonable person that the Officials' conduct was unlawful under the circumstances? *Id.* at 624. Though it is necessary to consider the prongs in the order presented, the Court may find it necessary to lay out the factors that will aid it in determining whether the right was clearly established in the course of determining whether a constitutional violation actually exists. *See Saucier*, 533 U.S. at 201, 121 S.Ct. 2156.

A. Did the University Officials Violate Plaintiffs' Constitutional Rights?

Determining whether the University Officials violated Plaintiffs' constitutional rights requires two separate analyses: (1) is the right Plaintiffs claim a constitutional one; and (2) was that right actually violated? The Court first considers the nature of the right that Plaintiffs are claiming and then examines whether the facts as presented in the Summary Judgment evidence show a violation.

1. Do Plaintiffs claim a constitutional right?

Plaintiffs assert claims under 42 U.S.C. § 1983, which provides a cause of action against "[e]very person who, under color of any statute . . . of any State . . . subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and the laws . . . " 42 U.S.C. § 1983. "Rather than creating substantive rights, § 1983 simply provides a remedy for the rights that it designates." *Johnson v. Harris County Food Control Dist.*, 869 F.2d 1565, 1573 (5th Cir. 1989). The assertion of an underlying constitutional or statutory violation is therefore a predicate to liability under § 1983. *See id.* In their attempt to establish federal liability against the University Officials, Plaintiffs premise their § 1983 claims upon an alleged substantive due process violation arising from the "state-created danger" theory.

In general, state governments are under no affirmative duty to provide protective services: "[T]he Due Process Clause generally confers no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty or property interests of which the government itself may not deprive the individual." *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 196-97, 109 S.Ct. 998, 1003-04, 103 L.Ed.2d 249 (1989). "[A] State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *Id.* at 197, 109 S.Ct. 1004; *see also Walton v. Alexander*, 44 F.3d 1297, 1302 (5th Cir. 1995) (en banc). The Constitution imposes a duty on the state to protect particular individuals only in "certain limited circumstances." *DeShaney*, 489 U.S. at 198, 109

S.Ct. 1004. Courts have recognized two such limited scenarios: (1) when the state has a special relationship with the person; or (2) when the state exposes a person to a danger of its own creation – a "state-created danger." *See Piotrowski v. City of Houston*, 51 F.3d 512, 516 (5th Cir. 1995) ("*Piotrowski I*") (citing *Salas v. Carpenter*, 980 F.2d 299, 307 (5th Cir. 1992)). Plaintiffs do not argue that the University Officials had a special relationship with the Bonfire victims; rather, they allege that by failing to ensure Bonfire's structural integrity, the University Officials violated the Due Process Clause by failing to protect the victims from a state-created danger.

The validity of the state-created danger theory is uncertain in the Fifth Circuit. Most recently, the Circuit has noted: "We have never recognized state-created danger as a trigger of State affirmative duties under the Due Process Clause. We again decline to do [so]." *Rivera v. Houston Indep. Sch. Dist.*, 349 F.3d 244, 249 (5th Cir. 2003). However, the Fifth Circuit has on numerous occasions recognized and discussed the existence and elements of the doctrine as well as its acceptance in other Circuits. *See Randolph v. Cervantes*, 130 F.3d 727 (5th Cir. 1997); *Doe v. Hillsboro Indep. Sch. Dist.*, 113 F.3d 1412 (5th Cir. 1997); *Piotrowski I*, 51 F.3d 512; *Johnson v. Dallas Indep. Sch. Dist.*, 38 F.3d 198 (5th Cir. 1994); *Lefall v. Dallas Indep. Sch. Dist.*, 28 F.3d 521 (5th Cir. 1994); *Salas*, 980 F.2d at 307. In fact, in *Scanlan*, the Fifth Circuit expressly noted that "the district court should have concluded that the plaintiffs stated a section 1983 claim under the state-created danger theory." *Scanlan*, 343 F.3d at 538. In as careful and respectful accordance with the Fifth Circuit's instructions in this case as is possible in the light of the foregoing, the Court will consider Plaintiffs' claims of a

state-created danger as if the theory is valid one. Accordingly, for purposes of further analysis, the Court will proceed under the conclusion that the violations Plaintiffs claim are indeed constitutional ones.

2. Were Plaintiffs' rights violated?

The Fifth Circuit has laid out the requirements a Plaintiff must meet in order to qualify for relief under the state-created danger theory. *See Piotrowski I*, 51 F.3d at 515. "First, a plaintiff must show that the state actors increased the danger to her. Second, a plaintiff must show that the state actors acted with deliberate indifference." *See id.*; *Doe*, 113 F.3d at 1415; *Johnson*, 38 F.3d at 201. Plaintiffs ultimately allege that the University Officials increased the danger to the victims by affirmatively delegating technical and complex Bonfire responsibilities to unqualified students without adequate supervision or guidelines. Defendants maintain that they "passively continued the status quo" and merely permitted students to do what they wanted. The resolution of these polar viewpoints requires examination of literally hundreds of contested facts. It would be inappropriate and virtually impossible for the Court to decide as a matter of law and based on the record now before the Court whether the state actors increased the danger to the Bonfire victims. Defendants are not entitled to summary judgment based on qualified immunity on the mere grounds that they did not increase the danger to the victims.

The Court's next analysis considers whether Defendants acted with deliberate indifference. There is a significant distinction between a tort and a constitutional wrong. *See Lefall*, 28 F.3d at 532 (citing *de Jesus Benavides v.*

Santos, 883 F.2d 385, 388 (5th Cir. 1989)). The Supreme Court has made it clear that "[t]he Due Process Clause of the Fourteenth Amendment is not implicated by the lack of due care of an official causing unintended injury to life, liberty or property." *Davidson v. Canon*, 474 U.S. 344, 347, 106 S.Ct. 668, 670, 88 L.Ed.2d 677 (1986). Where a government official is merely negligent in causing the injury, no procedure for compensation is *constitutionally* required. *See id.* at 347, 106 S.Ct. 670. Even reckless or grossly negligent conduct by state officials falls squarely within the ambit of traditional state tort law. *See de Jesus Benavides*, 883 F.2d at 388. Accordingly, the conduct of a state actor does not violate a victim's right to substantive due process unless that conduct is carried out with deliberate indifference.

The Fifth Circuit defines "deliberate indifference" as "'a lesser form of intent' rather than a 'heightened form of negligence.'" *Lefall*, 28 F.3d at 531; *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 453 n.13 (5th Cir. 1994) (explaining that deliberate indifference involves a higher degree of certainty than gross negligence). To establish deliberate indifference, "the environment created by the state actors must be dangerous; they must know it is dangerous; and . . . they must have used their authority to create an opportunity that would not otherwise have existed for the . . . crime to occur." *Johnson*, 38 F.3d at 201. Deliberate indifference can arise from "tortious conduct exceeding mere negligence but not quite rising to the level of intentional, e.g. deliberate (or conscious) indifference, recklessness or gross negligence." *Salas*, 980 F.2d at 307. Essentially, "[t]he key to the state created danger cases . . . lies in the state actors' culpable knowledge and conduct in affirmatively placing an individual in a position of danger,

effectively stripping a person of [his or] her ability to defend [himself or] herself, or cutting off potential sources of private aid." *Johnson*, 38 F.3d at 201 (quotations and citations omitted).

In this case, Plaintiffs argue that Defendants deliberately ignored the possible dangers of Bonfire in an effort to avoid future liability. Defendants allege that they never knew or could have known that the Bonfire might collapse and therefore cannot be held liable under a deliberate indifference standard. In its Opinion in this case, the Fifth Circuit stated: "Whether deliberately delegating the construction of the bonfire stack to students the University Officials allegedly knew were not qualified to handle such a dangerous project, and whether deliberately providing no supervision to students building the bonfire even though they knew the students were not qualified to build the stack, constituted deliberate indifference presents fundamental questions of material fact." *Scanlan*, 343 F.3d at 539. Though this statement was made in an Opinion disposing of Defendants' Motion to Dismiss, the summary judgment evidence submitted since then has only muddied the waters further. At this stage in the proceedings, there remain multiple questions of fact as to whether Defendants acted with deliberate indifference. Consequently, this Court readily agrees that the existence of these questions prevents the Court from deciding whether Defendants did or did not act with deliberate indifference as a matter of law.

B. Was Defendants' Conduct Objectively Reasonable in Light of Clearly Established Law?

Notwithstanding the Court's conclusion that there exists a genuine issue of material fact concerning Defendants' violation of Plaintiffs' due process-based right to be free from state-created danger, Defendants are entitled to qualified immunity if their conduct was "objectively reasonable in light of the legal rules that were clearly established at the time of [their] actions." *McClendon*, 305 F.3d at 323. As noted above, the Circuit has recognized an individual's substantive due process right to be free from state-created danger. *See Scanlan*, 343 F.3d at 538 (holding that this Court "should have concluded that the plaintiffs stated a section 1983 claim under the state-created danger theory"). By holding that Plaintiffs stated a claim upon which relief could be granted, the Circuit necessarily recognized as valid the theory of relief behind Plaintiffs' claims.[3]

However, under qualified immunity analysis, the Court must determine whether the right to be free from state-created danger was clearly established under the Due Process Clause *at the time of the events and activities*

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[3] In the Court's understanding of Fifth Circuit due process jurisprudence, *Scanlan* charts a new course by affirmatively recognizing the state-created danger theory for the first time. However, as noted above, *see supra* pp. 5-6, the Fifth Circuit later expressly disavowed *Scanlan*' s apparent recognition of the state-created danger theory. *See Rivera*, 349 F.3d at 249 n.5 ("Despite remanding that case to the district court for further proceedings, we did not recognize the state-created danger theory."). Because the second prong of the qualified immunity inquiry focuses on the state of the law at the time of the activities underlying this lawsuit, however, this development does not materially affect Plaintiffs' claims.

in question. The Fifth Circuit first considered a state-created danger claim in *Salas v. Carpenter*, 980 F.2d 299 (5th Cir. 1992), a case involving a court clerk who was taken hostage and eventually killed by her estranged husband in the Tarrant County courthouse. The plaintiffs claimed that the Sheriff deprived the victim of her life by preventing the Police Department's SWAT and hostage negotiation teams from securing her release and by using incompetent hostage negotiators. *Id.* at 303. The Fifth Circuit held that the sheriff had not violated a constitutional right as a matter of law because, unlike the state officials in other state-created danger cases, the sheriff did not "worsen [the victim's] position and abandon her to allow events to run their course." *Id.* at 309. In *McClendon*, decided ten years after *Salas*, the en banc Fifth Circuit stated that *Salas* "did not address the viability of the state-created danger theory"; therefore, *Salas* "would not have provided a reasonable officer with 'fair warning' that creating or increasing a danger to a known victim with deliberate indifference towards that victim violates the victim's substantive due process rights." *McClendon*, 305 F.3d at 330. In other words, the Fifth Circuit's discussion of the state-created danger theory in *Salas* did not clearly establish the right to be free from state-created danger.

The Fifth Circuit recognized in *McClendon* that many circuits have read *DeShaney* to mean that the Due Process Clause imposes an affirmative duty upon state officials to protect an individual from third-party violence "if the state actor played an affirmative role in creating or exacerbating a dangerous situation that led to the individual's injury." *McClendon*, 305 F.3d at 324. The Circuit specifically noted, however, that it had not recognized the

state-created danger theory. *See id.* at 325 ("[W]e have not yet determined whether a state official has a similar duty to protect individuals from state-created dangers.") (citing *Piotrowski v. City of Houston*, 237 F.3d 567, 584 (5th Cir. 2001) ("*Piotrowski II*"); *Randolph*, 130 F.3d at 731). In the *McClendon* court's assessment, the Fifth Circuit's reluctance to endorse the state-created danger theory in the period since *Salas* suggested that "a reasonable officer in this Circuit would, even today, be unclear as to whether there is a right to be free from 'state-created danger.'" *Id.* at 332 n.12; *cf. Rivera*, 349 F.3d at 249 ("We have never recognized state-created danger as a trigger of State affirmative duties under the Due Process clause. We again decline to do [so].") (citation and footnote omitted). *McClendon* highlights the significance of the Fifth Circuit's treatment of this question. The Circuit has not merely declined to recognize the state-created danger theory of substantive due process; it has scrupulously avoided it for more than ten years. The Fifth Circuit's reluctance to adopt the state-created danger theory is therefore not a mere neutral factor to be considered against the general consensus among other circuits, but a caution that the Fifth Circuit might not join that consensus.[4]

This Court therefore most respectfully concludes that the state-created danger theory of substantive due process was not clearly established at the time of Defendants'

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[4] As the *McClendon* Court put it, "a strong consensus of authorities in other circuits is more likely to be determinative on a subject when this circuit is *tabula rasa* on that subject than when the landscape in this circuit is littered with opinions expressing varying levels of skepticism." *McClendon*, 305 F.3d at 332 n.12.

Bonfire-related activities. Because Plaintiffs' theory had not been adopted as a viable avenue to a substantive due process claim, a reasonable school official would not have been aware that the Fourteenth Amendment's Due Process Clause provided a constitutional right to be free from state-created danger, much less than an injury caused by a school administrator's failure to exercise control over an activity such as Bonfire would violate that right. Accordingly, Defendants are entitled to qualified immunity from Plaintiffs' § 1983 claims.

IV. Conclusion

For the reasons articulated above, Defendants' Renewed Motion for Summary Judgment is hereby **GRANTED**. All claims against the University Officials are **DISMISSED WITH PREJUDICE**. All Parties are to bear their own taxable costs, expenses, and attorneys' fees incurred herein to date. A Final Judgment will be issued concurrently with this Order.

IT IS SO ORDERED.

DONE this 20th day of May, 2004, at Galveston, Texas

/s/ Samuel B. Kent
SAMUEL B. KENT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

BILL DAVIS Plaintiff, v. TEXAS A&M UNIVERSITY *et al.* Defendants	§ § § § § § § §	CIVIL ACTION NO. G-01-720

FINAL JUDGMENT

(Entered Jul. 23, 2002)

Pursuant to the Court's Order Dismissing Plaintiff's Federal Law Claims with Prejudice and Dismissing Plaintiff's State Law Claims without Prejudice, each and all federal law claims brought by Plaintiff against Defendants are hereby **DISMISSED WITH PREJUDICE**. Pursuant to that same Order, each and all state law claims brought by Plaintiffs against the individual Defendants are hereby **DISMISSED WITHOUT PREJUDICE**. All relief not herein provided is expressly **DENIED**. All Parties are **ORDERED** to bear their own costs and attorney's fees incurred herein to date. **THIS IS A FINAL JUDGMENT.**

IT IS SO ORDERED.

DONE this 23rd day of July, 2002, at Galveston, Texas.

/s/ Samuel B. Kent
SAMUEL B. KENT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS GALVESTON DIVISION

BILL DAVIS Plaintiff,	§	
v.	§	CIVIL ACTION NO. G-01-720
TEXAS A&M UNIVERSITY *et al.*	§	
Defendants	§	

ORDER DISMISSING PLAINTIFF'S FEDERAL LAW CLAIMS WITH PREJUDICE AND DISMISSING PLAINTIFF'S STATE LAW CLAIMS WITHOUT PREJUDICE

(Entered Jul. 23, 2002)

The Texas A&M Bonfire ("Bonfire") tragically collapsed in the early hours of November 18, 1999, killing twelve students and injuring an additional twenty-seven. This action is one of six virtually identical lawsuits[1] now

[1] The Court is issuing this Order in all six lawsuits, which are styled as *Breen v. Tex. A&M Univ., et al.*, No. G-01-CV-670 (S.D. Tex. filed Oct. 24, 2001); *Comstock v. Tex. A&M Univ., et al.*, No. G-01-CV-730 (S.D. Tex. filed Nov. 19, 2001); *Davis v. Tex. A&M Univ., et al.*, No. G-01-CV-720 (S.D. Tex. filed Nov. 16, 2001); *Kimmel v. Tex. A&M Univ., et al.*, No. G-01-CV-719 (S.D. Tex. filed Nov. 16, 2001); *Scanlan v. Tex. A&M Univ., et al.*, No. G-01-CV-733 (S.D. Tex. filed Nov. 19, 2001); and *Self, et al. v. Tex. A&M Univ., et al.*, No. G-01-CV-721 (S.D. Tex. filed Nov. 16, 2001). The Plaintiffs are, in *Breen*, the brother/administrator and parents of Christopher Breen, a former student killed in the collapse; in *Comstock*, John Andrew Comstock, the most severely injured surviving victim of the collapse, and his mother; in *Davis*, Bill Davis, one of the students injured in the collapse; in *Kimmel*, the estate and parents of Lucas Kimmel, one of the students killed in the collapse; in *Scanlan*, Lauren Scanlan, one of the students injured in the collapse,

(Continued on following page)

pending before the Court wherein the Plaintiffs allege that Texas A&M University ("the University") and various former and present high-level University employees[2] ("University Officials") violated 42 U.S.C. § 1983 when they deprived the Bonfire victims of their Fourteenth Amendment right to substantive due process by acting with deliberate indifference to the state created danger that killed or injured them. Plaintiffs further allege that Defendants negligently harmed the victims in violation of Texas state law.[3] On May 24, 2002, Defendants filed a Motion for Summary Judgment wherein they assert that they are immune from liability with respect to Plaintiffs'

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and her parents; and in *Self,* the mother/administrator of Jerry Don Self (student killed), the mother/administrator and father of Bryan McClain (student killed); the father/administrator and mother of Christopher Lee Heard (student killed), the father/administrator and mother of Chad Powell (student killed), Matthew Robbins (student injured), Dominic Braus (student injuried) and his mother. In all, these six suits represent eleven (six killed, five injured) of the thirty-nine total victims of the Bonfire collapse.

[2] The University Officials include: Russell Thompson; Dr. J. Malon Southerland; Dr. William Kibler; Dr. John J Koldus, III; Dr. Ray M. Bowen; Dr. Kevin Jackson; Dr. Zack Coapland; Maj. Gen. M.T. Hopgood; Brig. Gen. Don Johnson; Maj. Rebecca Ray; Jim Reynolds; Robert Harry Stiteler; and Michael Krenz. Only Thompson, Bowen and Southerland are named as Defendants in all six suits. The remaining individuals are named as Defendants in *Self* only, or *Self* and *Comstock.* The Court will hereinafter refer to the University and the University Officials together as "Defendants."

[3] The *Self* and *Comstock* Plaintiffs have also asserted state law claims against a number of Defendants who, although intimately involved with the University, were not employed by the University at the time of the Bonfire collapse. The analysis in Part II and Part III of this Order pertains only to the merits of Plaintiffs' claims against the University and the University Officials; and in no way comments upon the validity of any Bonfire-related claim, filed by any Plaintiff, against any non-state actor Defendant.

federal and state law claims and alternatively, that Plaintiffs have failed to state a viable cause of action upon which relief can be granted.[4] After very carefully and thoughtfully considering Defendants' well-prepared Motion, Plaintiffs' insightful Responses thereto, the lengthy record in this matter and the applicable law, the Court concludes that Defendants' Motion for Summary Judgment must be **GRANTED IN PART** with respect to Plaintiffs' federal law claims. For reasons set forth below, the Court need not reach the merits of Defendants' Motion for Summary Judgment with respect to Plaintiffs' allegations of negligence, as the Court respectfully declines to exercise supplemental jurisdiction over Plaintiffs' state law claims.[5]

I.

The following facts are primarily derived from the Final Report of the Special Commission on the 1999 Texas A&M Bonfire ("Final Report"). At this stage of the proceedings, the Parties have accepted the Final Report – the product of hundreds of hours of investigation and expert analysis – as an authoritative account of the history of Bonfire, the mechanics of the 1999 collapse and the factors that contributed to this far-reaching tragedy. The Court likewise adopts the Final Report as a definitive narrative

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[4] Defendants' Motion for Summary Judgment incorporates the legal arguments and authorities contained within their Rule 12(b)(6) Motion to Dismiss, filed December 19, 2001.

[5] Several of the Plaintiffs are not asserting state law claims in the instant lawsuits, as they have already filed such claims in various state courts. Part IV of this Order, which pertains to the Court's supplemental jurisdiction, is therefore inapplicable to those Plaintiffs.

of the relevant facts for purposes of its instant analysis. However, because the Court wishes to provide as comprehensive of a factual summary as possible, the following account also includes several facts gleaned from the summary judgment evidence.

The much loved and revered Texas A&M Bonfire tradition began humbly, with a burning trash heap in 1909. Over the ensuing ninety years, Bonfire grew into one of the most cherished traditions of Texas A&M University, uniting students, administrators, alumni and the surrounding community each September, October and November. The process of cutting trees into logs, stacking the logs into a towering structure and preparing to ceremoniously burn the edifice on the eve of Texas A&M's annual football game with the University of Texas occupied over five thousand students for an estimated 125,000 hours each fall. At the culmination of these efforts, an estimated forty to eighty thousand individuals gathered annually to watch Bonfire ignite and burn. The University's students, or "Aggies," believe that Bonfire symbolizes their burning desire to "beat the hell out of t.u" at the next day's football game. It is symbolic not only of one school deeply rooted in tradition, but is representative of the entire Nation's passionate fascination with the most venerated aspects of collegiate football.

Bonfire may have started out as a pile of wood and trash, but by 1999, it had evolved into a massive structure with measurable technical complexity. The initial switch from trash to logs took place in the 1940s, when the students introduced a center pole and a teepee-shaped design. Because a teepee-shaped structure can only reach as high as its tallest log, the students began building Bonfire with multiple layers of logs in the 1960s. The 1968

and 1969 Bonfires utilized this multi-tier design, with the 1969 Bonfire reaching 109 feet – the tallest Bonfire ever recorded. In the late 1970s, Bonfire began to take on a wedding cake-shaped design, with multiple cylindrical layers stacked one on top of the other. Since the 1980s, all bonfires have been (1) built in the wedding cake design; (2) sixty to eighty feet tall; (3) six tiers bound with wire; (4) built around a two-part spliced center pole; and (5) surrounded by four perimeter poles with guy ropes. A completed 1990s Bonfire likely weighed over two million pounds. No other institution of higher learning in the world lays claim to a blazing bonfire of such monumental proportions, and it is an instantly recognizable source of pride and "fighting spirit" to past, present and future Aggies around the globe.

Even in light of Bonfire's massive proportions, its design and construction always remained almost the exclusive purview of the students. The "Redpots," student leaders between the ages of 19 and 21, controlled the Bonfire build year after year. The Repots were not licensed engineers or architects, lacked formalized construction training and were not required to attend classes on architectural design or building techniques. Moreover, Redpots possessed less than two months experience as "Junior Redpots" before being promoted to Redpots as seniors, failed to utilize blueprints and relied on building techniques that were passed down orally from their student predecessors. Yet Defendants entrusted the Redpots with the primary responsibility for erecting the enormous Bonfire each fall.

Defendants undoubtably recognized the dangers of Bonfire. In fact, one University document noted that "[i]t is a well-established fact that Bonfire constitutes by far

the single most liability laden student activity on campus." Other University documents warned that "Bonfire is, by its vary nature, a hazardous activity"; "Bonfire involves thousands of students engaged in a variety of activities, some of which involve potential risks and liability and therefore supervision is paramount"; and "[a]s we all are aware, Bonfire is a very risky undertaking from a safety and liability perspective." Blaine Lewis, a Junior Redpot, wrote in a 1997 paper that stacking the Bonfire's logs "has the potential for great tragedy at any time." Against this backdrop, the University purchased a two million dollar general liability insurance policy to insure against a catastrophic disaster on campus.

Nevertheless, very few truly significant restrictions were ever imposed, communicated or uniformly enforced to protect the safety of Bonfire participants. However, Defendants did not ignore Bonfire safety altogether. Faculty and staff frequently visited the Bonfire site for observation purposes. Defendants created the faculty post of "Bonfire Advisor," implemented a policy that restricted access to the Bonfire site during construction and intermittently passed other safety measures in response to particular "trigger" events. For instance, Defendants (1) imposed a fifty-five foot height restriction on Bonfire in response to fire hazard complaints; (2) required Bonfire participants to attend tree-cutting training programs after they received reports of cut-site accidents; (3) appointed an alcohol awareness committee and organized the "Don't Shatter the Tradition" campaign to combat excessive Bonfire-related drinking; and (4) prohibited students from riding in the back of pick-up trucks after a motor vehicle fatality. The Final Report characterizes this conduct as a "reactive risk management model" and explains that Defendants only

implemented very specific remedial measure in response to specific triggers. Apparently, no specific events or incidents triggered Defendants to query whether Bonfire was structurally unsound prior to 1999. Consequently, they never inquired into Bonfire's structural integrity; and therefore neglected to reexamine Bonfire's design prior to the collapse.

It can be reasonably argued that Defendants *should* have undertaken a study of Bonfire's structural soundness in 1994. That year, the partly constructed edifice suffered a partial collapse (or "lean") that should have alerted the State Defendants of Bonfire's instability. However, the 1994 mishap was attributed by those involved to wet and unstable ground, not structural integrity. In fact, those involved praised the structural integrity of the 1994 Bonfire because heavy equipment was needed to pull the stack apart. Consequently, the mishap failed to trigger a design re-examination. According to the Final Report, the "people obviously concerned with Bonfire safety, did in fact misinterpret these events and missed clear warning signs about structural integrity. This tunnel vision in decision [was] due . . . to a cultural bias in which legitimate courses of action outside past experience or contrary to the University's pre-disposition are often not considered. . . . More objective interpretations or more conservative interpretations, which might have led to a structural reassessment, could reasonably have been considered."

Regrettably, because of Defendants' reluctance to depart from or question "the way its always been," no one viewed the 1999 Bonfire as a potentially hazardous towering structure tenuously held together with wire. More significantly, no one proposed a sweeping reassessment of Bonfire's construction process. And the results were

catastrophic and heartbreaking. The 1999 Bonfire collapsed prior to completion, killing twelve students and injuring twenty-seven others, resulting in an enormous groundswell of grief and remorse which continues to reverberate to the deepest recesses of the worldwide Aggie community.

The Final Report characterizes the physical mechanics of the collapse as a "containment failure" in the first tier of logs, primarily caused by (1) excessive internal stresses driven primarily by aggressive wedging of second tier logs into the first tier; and (2) inadequate containment strength caused by insufficient binding support in the wiring used to tie the logs together. Moreover, the first stack of the 1999 Bonfire was not wrapped with steel cables, further reducing containment strength. Steel cables had been wrapped around the first tier as a matter of course for several years prior to 1999. The Final Report also identifies the overarching factors that brought about the physical collapse: the absence of a proactive risk management model; the University community's cultural bias impeding risk identification; the lack of student leadership knowledge and skills pertaining to structural integrity; and the lack of formal, written Bonfire design plans or construction methodology. Together, these factors created an environment wherein students were permitted to construct a complex and dangerous structure without adequate engineering supervision or physical safety controls and led to a complex organizational failure. The Bonfire collapse was not caused by a specific event, error or omission in 1999, but, rather, by decisions and actions taken by both students and University officials over many, many years.

II.

The Court will initially consider Plaintiffs' § 1983 claims against the University, before turning to Plaintiffs' claims against the University Officials. In their Motion for Summary Judgment, Defendants maintain that the University is entitled to summary judgment in its favor on the basis of Eleventh Amendment immunity. The Court agrees.

The University is a state-funded state institution of higher education. *See* Tex. Educ. Code § 86.02 (signifying that Texas A&M University was created by the laws of the State of Texas). Consequently, Plaintiffs are barred from bringing this suit against the University unless they are able to overcome the State's jurisdictional immunity in federal court, commonly referred to as "Eleventh Amendment" immunity.[6] *See Quern v. Jordan,* 440 U.S. 332, 341, 99 S.Ct. 1139, 1145, 59 L.Ed.2d 358 (1979). Eleventh Amendment immunity prohibits actions against a state entity in federal court, unless either the state has waived its sovereign immunity or Congress, pursuant to another provision in the Constitution, has expressly abrogated the state's immunity. *See Will v. Mich. Dept. of State Police,* 491 U.S. 58, 66, 109 S.Ct. 2304, 2309-10, 105 L.Ed.2d 45 (1989); *Welch v. Tex. Dept. of Highways and Pub. Transp.,* 483 U.S. 468, 473-74, 107 S.Ct. 2941, 2946, 97 L.Ed.2d 389 (1987). A state's intention to waive its sovereign immunity

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[6] The Court notes that "Eleventh Amendment" immunity is not actually derived from the Eleventh Amendment to the Constitution. *See Alden v. Maine,* 527 U.S. 706, 713, 199 S.Ct. 2240, 2246, 144 L.Ed.2d 636 (1999) (explaining that the phrase "Eleventh Amendment immunity" is "convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment.").

must be "unequivocally expressed." *Stem v. Ahearn,* 908 F.2d 1, 4 (5th Cir. 1990) (citing *Port Authority Trans-Hudson Corp. v. Feeney,* 495 U.S. 299, 305-06, 100 S.Ct. 1868, 1873, 109 L.Ed.2d 264 (1990)). Significantly, Texas has not consented to be sued in federal court by individuals regarding the 1999 Bonfire collapse, nor has state sovereign immunity been abrogated or compromised by Congress with the passage of § 1983. The Supreme Court has held, in fact, that states are not "persons" subject to suit within § 1983's scope. *See Arizonans for Official English v. Ariz.,* 520 U.S. 43, 69, 117 S.Ct. 1055, 1069, 137 L.Ed.2d 170 (1997) (citing *Will,* 491 U.S. at 71, 109 S.Ct. at 2312); *see also Cronen v. Tex. Dept. of Human Servs.,* 977 F.2d 934, 936 (5th Cir. 1992); *Stem,* 908 F.2d at 4. Accordingly, the Court finds that the University is shielded from liability in this matter by its Eleventh Amendment immunity, as a matter of law.[7] Consequently, Defendants' Motion for Summary Judgment is hereby **GRANTED** with respect to Plaintiffs' federal law claims against the University and

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[7] Previous decisions of the Fifth Circuit and District Courts within the Southern District of Texas have consistently afforded Eleventh Amendment immunity to state universities, including Texas A&M. *See, e.g., Tex. ex rel. Bd. of Regents of Univ. of Tex. Sys. v. Walker,* 142 F.3d 813, 820 n.10 (5th Cir. 1998) (citing *Regents of Univ. of Cal. v. Doe,* 519 U.S. 425, 429-31, 117 S.Ct. 900, 903-04, 137 L.Ed.2d 55 (1997) and *United Carolina Bank v. Bd. of Regents of Stephen F. Austin State Univ.,* 665 F.2d 553, 556-61 (5th Cir. 1981)); *Mangaroo v. Nelson,* 864 F.2d 1202, 1204 (5th Cir. 1989); *Gay Student Servs. v. Tex. A&M Univ.,* 737 F.2d 1317, 1333-334 (5th Cir. 1984); *Lowery v. Univ. of Houston-Clear Lake,* 82 F.Supp.2d 689, 693 (S.D.Tex.2000); *Chacko v. Tex. A&M Univ.,* 960 F.Supp. 1180, 1197-198 (S.D.Tex.1997); *Baldwin v. Univ. of Tex. Med. Branch at Galveston,* 954 F.Supp. 1022, 1030 (S.D.Tex.1996); *Idoux v. Lamar Univ. Sys.,* 817 F.Supp. 637, 639-640 (E.D.Tex.1993); *Zentgraf v. Tex. A&M Univ.,* 492 F.Supp. 265, 271-72 (S.D.Tex.1980).

each and all of those claims are hereby **DISMISSED WITH PREJUDICE.**

III.

Plaintiffs also allege that the University Officials are liable for the harm that befell the Bonfire victims pursuant to § 1983.[8] In response, Defendants contend that Plaintiffs' § 1983 claim against the University Officials must be dismissed pursuant to Fed. R. Civ. P. 12(b)(6), or, alternatively, on qualified immunity grounds. The Court need not reach the qualified immunity issue, however, because Defendants correctly assert that a Rule 12(b)(6) dismissal is warranted.

Legal Standard for Rule 12(b)(6) Dismissal

The Federal Rules of Civil Procedure authorize a court, upon suitable showing, to dismiss any action or any claim within an action for failure to state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6). Put another way, Rule 12(b)(6) dismissal is appropriate when the "the plaintiff would not be entitled to relief under any set of facts or any possible theory that he could prove consistent with the allegations in his complaint." *Jones v. Greninger,* 188 F.3d 322, 324 (5th Cir. 1999); *see also* Fed. R. Civ. P. 12(b)(6). When making this determination, the Court accepts as true all well-pleaded allegations in the complaint, and views them in a light most favorable to the plaintiff. *See Malina v. Gonzales,* 994 F.2d 1121,

[8] Plaintiffs have sued the University Officials in their individual capacities only.

1125 (5th Cir. 1993). A plaintiff must plead specific facts in order to avoid dismissal for failure to state a claim and consequently, the Court will not accept conclusory allegations or unwarranted deductions of fact contained within the plaintiff's complaint as true. *See Tuchman v. DSC Communications Corp.,* 14 F.3d 1061, 1067 (5th Cir. 1994). Unlike a Motion for Summary Judgment, a Motion to Dismiss should be granted only when it appears without a doubt that the plaintiff can prove no set of facts in support of his claims that would entitle him to relief. *See Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957).

In considering a motion to dismiss for failure to state a claim, a district court must limit itself to the contents of the pleadings, including attachments thereto. *See* Fed. R. Civ. P. 12(b)(6). However, "[d]ocuments that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to [the plaintiff's] claims." *Collins v. Morgan Stanley Dean Whitter,* 224 F.3d 496, 498-99 (5th Cir. 2000) (citing *Venture Assoc. Corp. v. Zenith Data Sys. Corp.,* 987 F.2d 429, 431 (7th Cir. 1993)); *see also Chambers v. Time Warner, Inc.,* 282 F.3d 147, 153 (2d Cir. 2002); *Branch v. Tunnell,* 14 F.3d 449, 453-54 (9th Cir. 1994); *In re Securities Litigation BMC Software, Inc.,* 183 F.Supp.2d 860, 883 (S.D.Tex.2001); *Franks v. Prudential Health Care Plan, Inc.,* 164 F.Supp.2d 865, 872 (S.D.Tex.2001). By attaching documents that are integral to the plaintiff's claims, "the defendant merely assists the plaintiff in establishing the basis of the suit, and the court in making the elementary determination of whether a claim has been stated." *Collins,* 224 F.3d at 499. In these cases, the Complaints on file repeatedly refer to the Final Report;

and Plaintiffs' allegations are clearly based upon the findings contained therein. Accordingly, in reviewing Plaintiffs' federal claims under Rule 12(b)(6), the Court will equally consider the Plaintiffs' well-pleaded allegations and the facts set out in the Final Report.

42 U.S.C. § 1983

Section 1983 provides a cause of action against "[e]very person who, under color of any statute . . . of any State . . . subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws. . . ." 42 U.S.C. § 1983; *see also Moore v. Willis Indep. Sch. Dist.,* 233 F.3d 871, 874 (5th Cir. 2000) (citing *Leffall v. Dallas Indep. Sch. Dist.,* 28 F.3d 521, 525 (5th Cir. 1994)). "Rather than creating substantive rights, § 1983 simply provides a remedy for the rights that it designates." *Johnston v. Harris County Flood Control Dist.,* 869 F.2d 1565, 1573 (5th Cir. 1989). The assertion of an underlying constitutional or statutory violation is therefore a predicate to liability under § 1983. *See id.* In their attempt to establish federal liability against the University Officials, Plaintiffs premise their § 1983 claims upon an alleged substantive due process violation, arising from the "state created danger" theory.[9]

[9] Defendants initially argue that Plaintiffs' § 1983 claims must be dismissed because the state created danger theory was not well-settled law in this Circuit at the time of the Bonfire collapse. The Court rejects this argument, however because the Fifth Circuit's recent decision in *McClendon v. City of Columbia,* 258 F.3d 432 (5th Cir. 2001), explains that the state created danger theory was the law in this Circuit well-before 1999. *See id.* at 441 ("We conclude that . . . [on July 12, 1993] it

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State Created Danger Theory

In general, state governments are under no affirmative duty to provide protective services: "[T]he Due Process Clause generally confers no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty or property interests of which the government itself may not deprive the individual ... [Thus,] a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 196-97, 109 S.Ct. 998, 1003-04, 103 L.Ed.2d 249 (1989); *see also McClendon v. City of Columbia*, 258 F.3d 432, 436 (5th Cir. 2001); *Walton v. Alexander*, 44 F.3d 1297, 1302 (5th Cir. 1995) (*en banc*). Rather, the Constitution imposes a duty on the state to protect particular individuals only in "certain limited circumstances." *DeShaney*, 489 U.S. at 198, 109 S.Ct. at 1004. The Fifth Circuit has recognized two such limited scenario, namely, when the state has a special relationship with the person or when the state exposes a person to a danger of its own creation, or a "state created danger." *See McClendon*, 258 F.3d at 436. Plaintiffs do not argue that the University Officials had a special relationship with the

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was clearly established that a state actor creating a danger, knowing of that danger, and using his authority to create an opportunity for a third person to commit a crime that otherwise might not have existed, was subject to liability for a violation of the victim's rights."). The fact that the Fifth Circuit recently agreed to rehear *McClendon en banc* does not change the Court's conclusion. *McClendon* is the best authority currently available on this issue and the Court sees no reason to depart from its reasoning. On the assumption that this ruling will be appealed, the Parties are of course free to seek reassessment of the present state of the law. But any modification thereof is a policy consideration best left to the Fifth Circuit.

Bonfire victims, rather, they allege that the University Officials violated the Due Process Clause by failing to protect the victims from a state created danger.

The Fifth Circuit set out the two basic requirements of the state created danger theory in *Piotrowski v. City of Houston,* 51 F.3d 512 (5th Cir. 1995). A plaintiff asserting such a claim must show the (1) the state actors increased the danger to him or her; and (2) the state actors acted with deliberate indifference. *See id.* at 515; *see also McClendon,* 258 F.3d at 437; *Doe v. Hillsboro Indep. Sch. Dist.,* 113 F.3d 1412, 1415 (5th Cir. 1997); *Johnson v. Dallas Indep. Sch. Dist.,* 38 F.3d 198, 201 (5th Cir. 1994). Plaintiffs allege that the University Officials created a danger by failing to ensure the Bonfire's structural integrity. The facts surrounding the Bonfire collapse clearly tend to suggest that the conduct of the University Officials may have contributed, at least in part, to the 1999 Bonfire collapse. But *even if* the University Officials created an environment that was dangerous to the Bonfire victims (and the Court is expressly not now so finding), it is quite clear that they did not do so with "deliberate indifference" – the requisite culpability to make out a constitutional violation.[10]

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[10] Furthermore, *even if* the University Officials did create an environment that was dangerous to the Bonfire victims, that fact appears to be insufficient to satisfy the first requirement for the state created danger theory. The Final Report concluded that the students who were building the 1999 Bonfire (a group which includes the students who were killed and/or harmed) also played a role in the harm that befell them. None of the Fifth Circuit cases recognizing the state created danger doctrine have involved an incident for which the victims were partially at fault. Rather, the relevant cases have only recognized state created dangers where state actors created situations that increased the risk of danger from *third parties* to specific individuals.

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Deliberate Indifference

There is a significant distinction between a tort and a *constitutional* wrong. *Leffall,* 28 F.3d at 532 (citing *de Jesus Benavides v. Santos,* 883 F.2d 385, 388 (5th Cir. 1989)). The Supreme Court has made it clear that "[t]he Due Process Clause of the Fourteenth Amendment is not implicated by the lack of due care of an official causing unintended injury to life, liberty or property." *Davidson v. Canon,* 474 U.S. 344, 347, 106 S.Ct. 668, 670, 88 L.Ed.2d 677 (1986). Rather, reckless or grossly negligent conduct by state officials falls squarely within the ambit of traditional state tort law. *See de Jesus Benavides,* 883 F.2d at 388. Simply put, where a government official is merely negligent in causing the injury, no procedure for compensation is *constitutionally* required. *See Davidson,* 474 U.S. at 347, 106 S.Ct. at 670. Accordingly, the conduct of a state actor fails to violate a victim's right to substantive due process unless that conduct is carried out with deliberate indifference.

The Fifth Circuit defines "deliberate indifference" as "'a lesser form of intent' rather than a 'heightened form of negligence." *Leffall,* 28 F.3d at 531; *Doe v. Taylor Indep. Sch. Dist.,* 15 F.3d 443, 453 n.13 (5th Cir. 1994) (explaining that deliberate indifference involves a higher degree of certainty than gross negligence). To establish deliberate indifference, "the environment created by the state actors must be dangerous; they must know it is dangerous; and . . . they must have used their authority to create an opportunity that would not otherwise have existed for the

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See, e.g. McClendon, 258 F.3d at 432; *Piotrowski v. City of Houston,* 51 F.3d at 512; *Johnson,* 38 F.3d at 198. On this basis alone, the state created danger theory is legally inapplicable here.

. . . crime to occur." *Johnson,* 38 F.3d at 201. Deliberate indifference can arise from "tortious conduct exceeding mere negligence but not quite rising to the level of intentional, e.g. deliberate (or conscious) indifference, recklessness or gross negligence." *Salas v. Carpenter,* 980 F.2d 299, 307 (5th Cir. 1992). Essentially, "[t]he key to the state created danger cases . . . lies in the state actors' culpable knowledge and conduct in affirmatively placing an individual in a position of danger, effectively stripping a person of [his or] her ability to defend [himself or] herself, or cutting off potential sources of private aid." *Johnson,* 38 F.3d at 201 (quotations and citations omitted).

In *Johnson,* the Fifth Circuit noted that *Wood v. Ostrander,* 879 F.2d 583 (9th Cir. 1989), exemplifies the state created danger theory of liability. In that case, a police officer arrested a drunken driver and impounded his car, leaving the driver's female passenger alone at night, without any means of getting home, in an area notorious for criminal activity. She was subsequently raped by a stranger who offered her a ride. *See id.* at 586. Other cases applying the state created danger theory are to a similar effect. *See. e.g. Dwares v. City of New York,* 985 F.2d 94, 99 (2d Cir. 1993) (holding that it would violate due process for police officers to conspire with and sanction violence by "skinheads" against persons burning American flags); *L.W. v. Grubbs,* 974 F.2d 119, 121-22 (9th Cir. 1992) (holding that § 1983 plaintiff had stated a claim by alleging that she was a nurse employed by the state, that her supervisors had instructed her to work alone with a known sex offender after leading her to believe that she would not be made to work under such conditions and that she had been assaulted by the sex offender while alone with him); *Freeman v. Ferguson,* 911 F.2d 52 (8th Cir. 1980) (finding a

viable § 1983 claim where a woman was killed by her estranged husband after the chief of police had directed his officers to ignore her pleas that they stop the husband, who was the police chief's friend, from threatening and intimidating her); *White v. Rochford,* 592 F.2d 381, 382-83 (7th Cir. 1979) (finding that two small children stated a § 1983 claim by alleging that police officers arrested their uncle and left them unattended in a car on the side of the freeway). In light of these authorities, the Court emphasizes that deliberate indifference arises in cases involving conduct that is substantially more abhorrent, and significantly more detestable, than even gross negligence.

The conduct of the University Officials does not rise to such a level, as a matter of law. As demonstrated by the Final Report, there is *no* evidence that the University Officials were aware of the impending Bonfire collapse. To the contrary, the Final Report concluded that "[n]o one in the [University's] administration ever interpreted ongoing behavioral problems as indications that safe Bonfire design and construction was beyond the capabilities of student leaders." Nor do the facts suggest that the University Officials directly prevented increased Bonfire safety or opposed a review of Bonfire's structural integrity. They simply failed to recognize that change was desperately needed. They built Bonfire the way that it had always been built and the way that it had always succeeded. For them, Bonfire was, and is, an institution. And, as stated in the Final Report, "leaders do not change institutions unless there is a clearly perceived need to do so."

The record presently before the Court amply demonstrates that the University Officials were aware of the dangers posed by Bonfire. Consequently, it can be persuasively argued that they may have acted negligently,

possibly even grossly so, and that the Bonfire collapse could have been prevented had cautionary measures been implemented. However, despite their knowledge of Bonfire's extremely risky nature and their failure to proactively avert or reduce those risks, the evidence equally shows that the University Officials were unaware of the *precise* risk at hand – the risk that the entire Bonfire would come tumbling down. Rather, the University Officials believed that ninety years of successful Bonfire building experience was enough in itself to ensure that the tradition would safely continue. Although the University Officials' lack of awareness might appear naive, and possibly even foolish, in retrospect, it cannot support a finding of deliberate indifference. This is not a case in which state actors "brought the victim into close proximity with a specific individual known to be likely to commit violence, . . . or abandoned the victim in a highly dangerous environment, . . . or conspired with [a] private actor who inflicted the deprivation." *Leffall,* 28 F.3d at 531. Plaintiffs concede that the University Officials took *some* measures to ensue Bonfire safety (i.e. height restriction, appointment of a Bonfire advisor, tree-cutting training program, alcohol awareness committee, prohibition against riding in the back of pick-up trucks). Simply put, because the University Officials were indeed concerned with Bonfire Safety (albeit, in hindsight, not concerned enough, or in precisely the right way), the Court cannot conclude that their conduct rose to the egregious level of a constitutional violation, as a matter of law.[11] *See id.* at

[11] The Court acknowledges that the existence of deliberate indifference is often a factual determination. However, because the Final Report affirmatively discloses that the University Officials in this case lacked the requisite culpability with respect to the alleged

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531-32 (concluding that even if school officials' decision to sponsor dance at high school, despite awareness of dangers posed thereby, was negligent, such conduct did not rise to the level of deliberate indifference to the rights of a student who was killed by random gunfire in the school parking lot after the dance); *Doe,* 15 F.3d at 456 n. 12 (observing that "good faith but ineffective responses" by state actors tend to defeat claims of deliberate indifference). In reaching this conclusion, the Court in no way condones the reactive risk management policy of the University Officials or their cultural bias against departing from tradition in favor of newer safer measures. Rather, the Court recognizes the distinction between state law torts and constitutional wrongs. Expanding the substantive due process clause to encompass the allegations at issue here would violate well-settled principles of constitutional law and expand the protections of the Fourteenth Amendment beyond their appointed boundaries. Therefore, because Plaintiffs fail to allege, and cannot allege, a cognizable substantive due process violation, as a matter of law, Plaintiffs' § 1983 claims against the University Officials warrant dismissal pursuant to Fed. R. Civ. P. 12(b)(6). Defendants' Motion for Summary Judgment is therefore **GRANTED** with respect to Plaintiffs' federal law claims against the University Officials and each and all of such claims are hereby **DISMISSED WITH PREJUDICE.**

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violation of the Bonfire victims' constitutional rights, it is not only appropriate, but mandatory in this instance to conclude that the University Officials failed to act with deliberate indifference, as a matter of law.

IV.

Having dismissed all of Plaintiffs' federal law claims, the Court is now faced with six negligence lawsuits governed purely by state tort law. Thus, the Court must decide whether to retain supplemental jurisdiction over Plaintiffs' remaining claims. In evaluating this matter, the Court is guided by the supplemental jurisdiction statute, 28 U.S.C. § 1367. Section (a) of that statute provides that "in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to the claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). Section (c) of the statute refines the supplemental jurisdiction doctrine by enumerating four circumstances in which District Courts have discretion to decline supplemental jurisdiction over state law claims: (1) when the state law claims raise novel or complex issues of state law; (2) when the state law claims substantially predominate over the claims within the district court's original jurisdiction; (3) when the district court dismisses the claims over which it has original jurisdiction; and (4) in exceptional circumstances, if there are other compelling reasons for declining jurisdiction. 28 U.S.C. § 1367(c). In this case, the third factor enumerated in § 1367(c) is clearly present, and to only a slightly lesser extent, the second and fourth factors as well. The Court has dismissed all of the claims that were within the Court's original jurisdiction and only Plaintiffs' state law claims remain. And those claims are manifestly better suited for resolution by a state court, applying squarely applicable state law, in front of a jury of state citizens. Accordingly, the

Court respectfully declines to exercise its supplemental jurisdiction over Plaintiffs' state law claims. *See Noble v. White,* 996 F.2d 385, 395 (5th Cir. 1993) ("District courts enjoy wide discretion in determining whether to retain supplemental jurisdiction over a state law claim once all federal claims are dismissed"); *Rhyne v. Henderson,* 973 F.2d 386, 395 (5th Cir. 1992) ("The district court has properly dismissed all of the federal questions that gave it original jurisdiction in this case. Therefore, we find that the district court's dismissal of the state law claims was proper under 28 U.S.C. § 1367(c)"); *see also United Mine Workers of Am. v. Gibbs,* 383 U.S. 715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966) ("Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of the applicable law."). As such, Plaintiffs' state law claims are hereby **DISMISSED WITHOUT PREJUDICE**. Plaintiffs are free to re-file their state law claims against Defendants in state court, if they so desire, either by filing new actions or by seeking leave to intervene in the state cases that are already well underway. In doing so, Plaintiffs are of course subject to the applicable limitations requirements.[12] All Parties are to bear their own taxable costs, expenses and attorneys' fees incurred herein to date; and all other pending Motions, filed by any of the Parties to this litigation, are hereby **DENIED** as moot.

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[12] For the same reasons, the Court also declines to exercise supplemental jurisdiction over the *Self* and *Comstock* Plaintiffs' state law claims against the non-state actor Defendants. Thus, those claims are likewise **DISMISSED WITHOUT PREJUDICE**, rather to proceed in either new or extant state court litigation, as appropriate.

IT IS SO ORDERED.

DONE this 23rd day of July, 2002, at Galveston, Texas.

/s/ Samuel B. Kent
SAMUEL B. KENT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

LAUREN N.T. SCANLAN, HOWARD SCANLAN, and DENISE SCANLAN,	§	
Plaintiffs,	§	CIVIL ACTION NO. G-01-733
J. MALON SOUTHERLAND, et al.	§	
Defendants.	§	

FINAL JUDGMENT

(Filed May 24, 2004)

Pursuant to the Court's Order Granting Defendants' Renewed Motion for Summary Judgment, entered this date, all claims brought by Plaintiffs against Defendants are hereby **DISMISSED WITH PREJUDICE**. All relief not herein provided is expressly **DENIED**. All Parties are **ORDERED** to bear their own costs, attorneys' fees, and expenses incurred herein to date. **THIS IS A FINAL JUDGMENT**.

IT IS SO ORDERED

DONE this 21st day of May 2004, at Galveston, Texas.

/s/ Samuel B. Kent
SAMUEL B. KENT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

LAUREN N.T. SCANLAN, HOWARD SCANLAN, and DENISE SCANLAN, Plaintiffs,	§	CIVIL ACTION NO. G-01-733
J. MALON SOUTHERLAND, et al. Defendants.	§	

ORDER GRANTING DEFENDANTS' RENEWED MOTION FOR SUMMARY JUDGMENT

(Filed May 24, 2004)

This lawsuit arises out of the tragic collapse of the Texas A&M Bonfire ("Bonfire") in the early hours of November 18, 1999, which killed twelve students and injured an additional twenty-seven. Now before the Court comes the Defendants' Renewed Motion for Summary Judgment. Because Defendants are entitled to qualified immunity from suit, the Motion is hereby **GRANTED**.

I. Background

The facts of this case have previously been laid out by this Court and the Fifth Circuit, and the Court will not repeat them in this Order. This action is one of six virtually identical lawsuits[1] now pending before the Court.

[1] The Court is issuing this Order in all six lawsuits, which are styled as *Breen v. Tex. A&M Univ., et al.*, No. G-01-CV-270 (S.D. Tex. filed Oct. 24, 2001); *Comstock v. Tex. A&M Univ., et al.*, No. G-01-CV-730 (S.D. Tex. filed Nov. 19, 2001); *Davis v. Tex. A&M Univ. et al.*, No.

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Plaintiffs allege that various former and present high-level employees of Texas A&M University[2] ("University Officials" or "Defendants") deprived the Bonfire victims of their Fourteenth Amendment right to substantive due process by acting with deliberate indifference to the state-created danger that killed or injured them. Plaintiffs further alleged violations of Texas law. In an Order dated July 23, 2002, the Court dismissed all of Plaintiffs' federal claims pursuant to Fed. R. Civ. P. 12(b)(6). The Court declined to exercise supplemental jurisdiction over Plaintiffs'

G-01-CV-720 (S.D. Tex. filed Nov. 16, 2001); *Kimmel v. Tex A&M Univ., et al.*, No. G-01-CV-719 (S.D. Tex. filed Nov. 16, 2001); *Scanlan v. Tex. A&M Univ., et al.*, No. G-01-CV-733 (S.D. Tex. filed Nov. 19, 2001); and *Self et al. v. Tex. A&M Univ., at al.*, No. G-01-CV-721 (S.D. Tex. filed Nov 16, 2001). The Plaintiffs are, in *Breen*, the brother/administrator and parents of Christopher Breen, a former student killed in the collapse; in *Comstock*, John Andrew Comstock, the most severely injured surviving victim of the collapse, and his mother; in *Davis*, Bill Davis, one of the students injured in the collapse; in *Kimmel*, the estate and parents of Lucas Kimmel, one of the students killed in the collapse; in *Scanlan*, Lauren Scanlan, one of the students injured in the collapse, and her parents; and in *Self*, the mother/administrator of Jerry Don Self (student killed), the mother/administrator and father of Bryan McClain (student killed), the father/administrator and mother of Christopher Lee Heard (student killed), the father/administrator and mother of Chad Powell (student killed), Matthew Robbins (student injured), Dominic Braus (student injured) and his mother. In all, these six suits represent eleven (six killed, five injured) of the thirty-nine total victims of the Bonfire collapse.

[2] The University Officials include: Russell Thompson; Dr. J. Malon Southerland; Dr. William Kibler; Dr. John J. Koldus, III; Dr. Ray M. Bowen; Dr. Kevin Jackson; Dr. Zack Coapland; Maj. Gen. M.T. Hopgood; Brig. Gen. Don Johnson; Maj. Rebecca Ray; Jim Reynolds; Robert Harry Stiteler; and Michael Krenz. Only Thompson, Bowen, and Southerland are named as Defendants in all six suits. The remaining individuals are named as Defendants in *Self* only, or *Self* and *Comstock*. The Court will hereinafter refer to the University Officials as "Defendants".

state-law claims, and the dismissal of those claims without prejudice was not appealed. Plaintiffs' claims against the University were dismissed on Eleventh Amendment immunity grounds, and no Plaintiff appealed that ruling. Plaintiffs' claims against the University Officials were dismissed after a determination that their actions did not rise to the level of deliberate indifference as a matter of law. It is that ruling that was appealed to the Fifth Circuit Court of Appeals. On August 19, 2003, the Fifth Circuit reversed this Court's findings as to the University Officials and remanded the case for further consideration consistent with its instructions. *See Scanlan v Tex. A&M Univ.*, 343 F.3d 533 (5th Cir. 2003). The Court of Appeals found that this Court impermissibly relied upon the Final Report of the Special Commissioners on the 1999 Texas A&M Bonfire ("the Final Report"). *See id.* at 538. The Circuit found that without consideration of the Final Report, and construing allegations in a light most favorable to Plaintiffs, the University Officials were not entitled to a dismissal of the claims against them. *See id.* Upon remand, Plaintiffs renewed their Motions for Summary Judgment, which were originally filed in May of 2002. After additional briefing by both sides, those Motions are now ripe for consideration.

II. Summary Judgment Standard

Summary judgment is appropriate if no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Garrett,* 477 U.S. 317, 323, 106 S. Ct. 2548, 2552-53, 91 L. Ed. 2d 265 (1986). When one party moves for summary judgment, the nonmoving party must set forth specific facts showing that there is a genuine

issue for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986). Issues of material fact are "genuine" only if they require resolution by a trier of fact. *See id.* at 248, 106 S. Ct. 2510. The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; rather, only disputes over facts that might affect the outcome of the lawsuit under governing law will preclude the entry of summary judgment. *See id.* at 247-48, 106 S. Ct. 2510. Nevertheless, if the evidence is such that a reasonable fact-finder could find in favor of the nonmoving party, summary judgment should not be granted. *See id.; see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986). Determining credibility, weighing evidence, and drawing reasonable inferences are left to the trier of fact. *See Anderson,* 477 U.S. at 255, 106 S. Ct. 2513.

III. Qualified Immunity Standard

The University Officials assert that they are entitled to qualified immunity against suit, and the claims against them should be dismissed. "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). "When a defendant invokes qualified immunity, the burden is on the plaintiff to demonstrate the inapplicability of the defense." *McClendon v. City of Columbia,* 305 F.3d 314, 323 (5th Cir. 2002). The University Officials' right to qualified immunity should be

determined through the application of a two-prong test. *See Saucier v. Katz,* 533 U.S. 194, 200, 121 S. Ct. 2151, 2155, 150 L. Ed. 2d 272 (2001); *Mace v. City of Palestine,* 333 F.3d 621, 623 (5th Cir. 2003). The first question is whether the facts alleged, considered in a light most favorable to Plaintiffs, show that the University Officials' conduct violated a constitutional right. *Mace,* 333 F.3d at 623. If so, the Court must determine whether that right was clearly established at the time it was violated. That is, would it have been clear to a reasonable person that the Officials' conduct was unlawful under the circumstances? *Id.* at 624. Though it is necessary to consider the prongs in the order presented, the Court may find it necessary to lay out the factors that will aid it in determining whether the right was clearly established in the course of determining whether a constitutional violation actually exists. *See Saucier,* 533 U.S. at 201, 121 S. Ct. 2156.

A. Did the University Officials Violate Plaintiffs' Constitutional Rights?

Determining whether the University Officials violated Plaintiffs' constitutional rights requires two separate analyses: (1) is the right Plaintiffs claim a **constitutional** one; and (2) was that right actually violated? The Court first considers the nature of the right that Plaintiffs are claiming and then examines whether the facts as presented in the Summary Judgment evidence show a violation.

1. Do Plaintiffs claim a constitutional right?

Plaintiffs assert claims under 42 U.S.C. § 1983, which provides a cause of action against "[e]very person who, under color of any statute . . . of any State . . . subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and the laws . . . " 42 U.S.C. § 1983. "Rather than creating substantive rights, § 1983 simply provides a remedy for the rights that it designates." *Johnston v. Harris County Food Control Dist.,* 869 F.2d 1565, 1573 (5th Cir. 1989). The assertion of an underlying constitutional or statutory violation is therefore a predicate to liability under § 1983. *See id.* In their attempt to establish federal liability against the University Officials, Plaintiffs premise their § 1983 claims upon an alleged substantive due process violation arising from the "state-created danger" theory.

In general, state governments are under no affirmative duty to provide protective services: "[T]he Due Process Clause generally confers no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty or property interests of which the government itself may not deprive the individual." *DeShaney v. Winnebago County Dep't of Social Servs.,* 489 U.S. 196-97, 109 S. Ct. 998, 1003-04, 103 L. Ed. 2d 249 (1989). "[A] State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *Id.* at 197, 109 S. Ct. 1004; *see also Walton v. Alexander,* 44 F.3d 1297, 1302 (5th Cir. 1995) (en banc). The Constitution imposes a duty on the state to protect particular individuals only in "certain limited circumstances" *DeShaney,* 489 U.S. at 198, 109

S. Ct. 1004. Courts have recognized two such limited scenarios: (1) when the state has a special relationship with the person; or (2) when the state exposes a person to a danger of its own creation – a "state-created danger." *See Piotrowski v. City of Houston,* 51 F.3d 512, 516 (5th Cir. 1995) *("Piotrowski I")* (citing *Salas v. Carpenter,* 980 F.2d 299, 307 (5th Cr. 1992)). Plaintiffs do not argue that the University Officials had a special relationship with the Bonfire victims; rather, they allege that by failing to ensure Bonfire's structural integrity, the University Officials violated the Due Process Clause by failing to protect the victims from a state-created danger.

The validity of the state-created danger theory is uncertain in the Fifth Circuit. Most recently, the Court of Appeals has noted: "We have never recognized state-created danger as a trigger of State-affirmative duties under the Due Process Clause. We again decline to do [so]." *Rivera v. Houston Indep. Sch. Dist.,* 349 F.3d 244, 249 (5th Cir. 2003). However, the Fifth Circuit has on numerous occasions recognized and discussed the existence and elements of the doctrine as well as its acceptance in other Circuits. *See Randolph v. Cervantes,* 130 F.3d 727 (5th Cir. 1997); *Doe v. Hillsboro Indep. Sch. Dist.,* 113 F.3d 1412 (5th Cir. 1997); *Piotrowski I,* 51 F.3d 512; *Johnson v. Dallas Indep. Sch. Dist.,* 38 F.3d 198 (5th Cir. 1994); *Lefall v. Dallas Indep. Sch. Dist.,* 28 F.3d 521 (5th Cir. 1994); *Salas,* 980 F.2d at 307. In fact, in *Scanlan,* the Fifth Circuit expressly noted that "the district court should have concluded that the plaintiffs stated a section 1983 claim under the state-created danger theory." *Scanlan,* 343 F.3d at 538. In accordance with the Fifth Circuit's instructions in this case, the Court will consider Plaintiffs' claims of a state-created danger as if the theory

is valid one. Accordingly, for purposes of further analysis, the Court will proceed under the conclusion that the violations Plaintiffs claim are indeed constitutional ones.

2. Were Plaintiffs' rights violated?

The Fifth Circuit has laid out the requirements a Plaintiff must meet in order to qualify for relief under the state-created danger theory. *See Piotrowski I,* 51 F.3d at 515. "First, a plaintiff must show that the state actors increased the danger to her. Second, a plaintiff must show that the state actors acted with deliberate indifference." *See id.; Doe,* 113 F.3d at 1415; *Johnson,* 38 F.3d at 201. Plaintiffs ultimately allege that the University Officials increased the danger to the victims by affirmatively delegating technical and complex Bonfire responsibilities to unqualified students without adequate supervision or guidelines. Defendants maintain that they "passively continued the status quo" and merely permitted students to do what they wanted. The resolution of these polar viewpoints requires examination of literally hundreds of facts. It would be inappropriate and virtually impossible for the Court to decide as a matter of law and based on the record now before the Court whether the state actors increased the danger to the Bonfire victims. Defendants are not entitled to summary judgment based on qualified immunity on the grounds that they did not increase the danger to the victims.

The Court's next analysis considers whether Defendants acted with deliberate indifference. There is a significant distinction between a tort and a *constitutional* wrong. *See Lefall,* 28 F.3d at 532 (citing *de Jesus Benavides v. Santos,* 883 F.2d 385, 388 (5th Cir. 1989)). The Supreme

Court has made it clear that "[t]he Due Process Clause of the Fourteenth Amendment is not implicated by the lack of due care of an official causing unintended injury to life, liberty or property." *Davidson v. Canon,* 474 U.S. 344, 347, 106 S. Ct. 668, 670, 88 L. Ed. 2d 677 (1986). Where a government official is merely negligent in causing the injury, no procedure for compensation is *constitutionally* required. *See id.* at 347, 106 S. Ct. 670. Even reckless or grossly negligent conduct by state officials falls squarely within the ambit of traditional state tort law. *See de Jesus Benavides,* 883 F.2d at 388. Accordingly, the conduct of a state actor does not violate a victim's right to substantive due process unless that conduct is carried out with deliberate indifference.

The Fifth Circuit defines "deliberate indifference" as "'a lesser form of intent' rather than a 'heightened form of negligence.'" *Lefall,* 28 F.3d at 531; *Doe v. Taylor Indep. Sch. Dist.,* 15 F.3d 443, 453 n.13 (5th Cir. 1994) (explaining that deliberate indifference involves a higher degree of certainty than gross negligence). To establish deliberate indifference, "the environment created by the state actors must be dangerous; they must know it is dangerous; and . . . they must have used their authority to create an opportunity that would not otherwise have existed for the . . . crime to occur." *Johnson,* 38 F.3d at 201. Deliberate indifference can arise from "tortious conduct exceeding mere negligence but not quite rising to the level of intentional, e.g. deliberate (or conscious) indifference, recklessness or gross negligence." *Salas,* 980 F.2d at 307. Essentially, "[t]he key to the state created danger cases . . . lies in the state actors' culpable knowledge and conduct in affirmatively placing an individual in a position of danger, effectively stripping a person of [his or] her ability to

defend [himself or] herself, or cutting off potential sources of private aid." *Johnson,* 38 F.3d at 201 (quotations and citations omitted).

In this case, Plaintiffs argue that Defendants deliberately ignored the possible dangers of Bonfire in an effort to avoid future liability. Defendants allege that they never knew or could have known that the Bonfire might collapse and therefore cannot be held liable under a deliberate indifference standard. In its Opinion in this case, the Fifth Circuit stated: "Whether deliberately delegating the construction of the bonfire stack to students the University Officials allegedly knew were not qualified to handle such a dangerous project, and whether deliberately providing no supervision to students building the bonfire even though they knew the students were not qualified to build the stack, constituted deliberate indifference presents fundamental questions of material fact." *Scanlan,* 343 F.3d at 539. Though this statement was made in an Opinion disposing of Defendants' Motion to Dismiss, the summary judgment evidence submitted since then has only muddied the waters further. At this stage in the proceedings, there remain multiple questions of fact as to whether Defendants acted with deliberate indifference. The existence of these questions prevents the Court from deciding whether Defendants did or did not act with deliberate indifference as a matter of law.

B. Was Defendants' Conduct Objectively Reasonable in Light of Clearly Established Law?

Notwithstanding the Court's conclusion that there exists a genuine issue of material fact concerning Defendants' violation of Plaintiffs' due process-based right to be

free from state-created danger, Defendants are entitled to qualified immunity if their conduct was "objectively reasonable in light of the legal rules that were clearly established at the time of [their] actions." *McClendon;* 305 F.3d at 323. As noted above, the Circuit has recognized an individual's substantive due process right to be free from state-created danger. *See Scanlan,* 343 F.3d at 538 (holding that this Court "should have concluded that the plaintiffs stated a section 1983 claim under the state-created danger theory"). By holding that Plaintiffs stated a claim upon which relief could be granted, the Circuit necessarily recognized as valid the theory of relief behind Plaintiffs' claims.[3]

Under qualified immunity analysis, the Court must determine whether the right to be free from state-created danger was clearly established under the Due Process Clause at the time of the events and activities in question. The Fifth Circuit first considered a state-created danger claim in *Salas v. Carpenter,* 980 F.2d 299 (5th Cir. 1992), a case involving a court clerk who was taken hostage and eventually killed by her estranged husband in the Tarrant County courthouse. The plaintiffs claimed that the Sheriff deprived the victim of her life by preventing the Police

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[3] In the Court's understanding of Fifth Circuit due process jurisprudence, *Scanlan* charts a new course by affirmatively recognizing the state-created danger theory for the first time. In a later decision, however, the Fifth Circuit expressly disavowed *Scanlan's* apparent recognition of the state-created danger theory. *See Rivera,* 349 F.3d at 249 n.5 ("Despite remanding that case to the district court for further proceedings, we did not recognize the state-created danger theory."). Because the second prong of the qualified Immunity inquiry focuses on the state of the law at the time of the activities underlying this lawsuit, however, this development does not materially affect Plaintiffs' claims.

Department's SWAT and hostage negotiation teams from securing her release and by using incompetent hostage negotiators. *Id.* at 303. The Fifth Circuit held that the sheriff had not violated a constitutional right as a matter of law because, unlike the state officials in other state-created danger cases, the sheriff did not "worsen [the victim's] position and abandon her to allow events to run their course." *Id.* at 309. In *McClendon,* decided ten years after *Salas,* the en banc Fifth Circuit stated that *Salas* "did not address the viability of the state-created danger theory"; therefore, *Salas* "would not have provided a reasonable officer with 'fair warning' that creating or increasing a danger to a known victim with deliberate indifference towards that victim violates the victim's substantive due process rights." *McClendon,* 305 F.3d at 330. In other words, the Fifth Circuit's discussion of the state-created danger theory in *Salas* did not clearly establish the right to be free from state-created danger.

The Fifth Circuit recognized in *McClendon* that many circuits have read *DeShaney* to mean that the Due Process Clause imposes an affirmative duty upon state officials to protect an individual from third-party violence "if the state actor played an affirmative role in creating or exacerbating a dangerous situation that led to the individual's injury." *McClendon,* 305 F.3d at 324. The Circuit specifically noted, however, that it had not recognized the state-created danger theory. *See id.* at 325 ("[W]e have not yet determined whether a state official has a similar duty to protect individuals from state-created dangers.") (citing *Piotrowski v. City of Houston,* 237 F.3d 567, 584 (5th Cir. 2001) ("*Piotrowski II*"); *Randolph,* 130 F.3d at 731). In the *McClendon* court's assessment, the Fifth Circuit's reluctance to endorse the state-created danger theory in the

period since *Salas* suggested that "a reasonable officer in this Circuit would, even today, be unclear as to whether there is a right to be free from 'state-created danger.'" *Id.* at 332 n.12; *cf. Rivera,* 349 F.3d at 249 ("We have never recognized state-created danger as a trigger of State affirmative duties under the Due Process clause. We again decline to do [so].") (citation and footnote omitted). *McClendon* highlights the significance of the Fifth Circuit's treatment of this question. The Circuit has not merely declined to recognize the state-created danger theory of substantive due process; it has scrupulously avoided it for more than ten years. The Fifth Circuit's reluctance to adopt the state-created danger theory is therefore not a mere neutral factor to be considered against the general consensus among other circuits, but a warning that the Fifth Circuit might not join that consensus.[4]

The Court therefore concludes that the state-created danger theory of substantive due process was not clearly established at the time of Defendants' Bonfire-related activities. Because Plaintiffs' theory had not been adopted as a viable avenue to a substantive due process claim, a reasonable school official would not have been aware that the Fourteenth Amendment's Due Process Clause provided a constitutional right to be free from state-created danger, much less that an injury caused by a school administrator's failure to exercise control over an activity such as

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[4] As the *McClendon* Court put it, "a strong consensus of authorities in other circuits is more likely to be determinative on a subject when this circuit is *tabula rasa* on that subject than when the landscape in this circuit is littered with opinions expressing varying levels of skepticism." *McClendon,* 305 F.3d at 332 n.12.

Bonfire would violate that right. Accordingly, Defendants are entitled to qualified immunity from Plaintiffs' § 1983 claims.

IV. Conclusion

For the reasons articulated above, Defendants' Renewed Motion for Summary Judgment is hereby **GRANTED**. All claims against the University Officials are **DISMISSED WITH PREJUDICE**. All Parties are to bear their own taxable costs, expenses, and attorneys' fees incurred herein to date. A Final Judgment will be issued concurrently with this Order.

IT IS SO ORDERED.

DONE this 21st day of May, 2004, at Galveston, Texas

/s/ Samuel B. Kent
SAMUEL B. KENT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

LAUREN N.T. SCANLAN, HOWARD SCANLAN and DENISE SCANLAN	§	
Plaintiffs,	§	CIVIL ACTION NO. G-01-733
v.	§	
TEXAS A&M UNIVERSITY *et al.*	§	
Defendants.	§	

FINAL JUDGMENT

(Entered Jul. 23, 2002)

Pursuant to the Court's Order Dismissing Plaintiffs' Federal Law Claims with Prejudice and Dismissing Plaintiffs' State Law Claims without Prejudice, each and all federal law claims brought by Plaintiffs against Texas A&M University and the individuals employed by the University are hereby **DISMISSED WITH PREJUDICE.** Pursuant to that same Order, each and all state law claims brought by Plaintiffs against the individuals employed by the University are hereby **DISMISSED WITHOUT PREJUDICE.** All relief not herein provided is expressly **DENIED.** All Parties are **ORDERED** to bear their own costs and attorney's fees incurred herein to date. **THIS IS A FINAL JUDGMENT.**

IT IS SO ORDERED.

DONE this 23rd day of July, 2002, at Galveston, Texas.

/s/ Samuel B. Kent
SAMUEL B. KENT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS GALVESTON DIVISION

LAUREN N.T. SCANLAN, HOWARD SCANLAN and DENISE SCANLAN	§	
Plaintiffs,	§	CIVIL ACTION NO. G-01-733
v.	§	
TEXAS A&M UNIVERSITY *et al.*	§	
Defendants.	§	

ORDER DISMISSING PLAINTIFFS' FEDERAL LAW CLAIMS WITH PREJUDICE AND DISMISSING PLAINTIFFS' STATE LAW CLAIMS WITHOUT PREJUDICE

(Entered Jul. 23, 2002)

The Texas A&M Bonfire ("Bonfire") tragically collapsed in the early hours of November 18, 1999, killing twelve students and injuring an additional twenty-seven. This action is one of six virtually identical lawsuits[1] now

[1] The Court is issuing this Order in all six lawsuits, which are styled as *Breen v. Tex. A&M Univ., et al.*, No. G-01-CV-670 (S.D. Tex. filed Oct. 24, 2001); *Comstock v. Tex. A&M Univ., et al.*, No. G-01-CV-730 (S.D. Tex. filed Nov. 19, 2001); *Davis v. Tex. A&M Univ., et al.*, No. G-01-CV-720 (S.D. Tex. filed Nov. 16, 2001); *Kimmel v. Tex. A&M Univ., et al.*, No. G-01-CV-719 (S.D. Tex. filed Nov. 16, 2001); *Scanlan v. Tex. A&M Univ., et al.*, No. G-01-CV-733 (S.D. Tex. filed Nov. 19, 2001); and *Self, et al. v. Tex. A&M Univ., et al.*, No. G-01-CV-721 (S.D. Tex. filed Nov. 16, 2001). The Plaintiffs are, in *Breen*, the brother/administrator and parents of Christopher Breen, a former student killed in the collapse; in *Comstock* John Andrew Comstock, the most severely injured surviving victim of the collapse, and his mother; in *Davis*, Bill Davis, one of the students injured in the collapse; in *Kimmel*, the estate and

(Continued on following page)

pending before the Court wherein the Plaintiffs allege that Texas A&M University ("the University") and various former and present high-level University employees[2] ("University Officials") violated 42 U.S.C. § 1983 when they deprived the Bonfire victims of their Fourteenth Amendment right to substantive due process by acting with deliberate indifference to the state created danger that killed or injured them. Plaintiffs further allege that Defendants negligently harmed the victims in violation of Texas state law.[3] On May 24, 2002, Defendants filed a Motion for Summary Judgment wherein they assert that

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parents of Lucas Kimmel, one of the students killed in the collapse; in *Scanlan*, Lauren Scanlan, one of the students injured in the collapse, and her parents; and in *Self*, the mother/administrator of Jerry Don Self (student killed), the mother/administrator and father of Bryan McClain (student killed); the father/administrator and mother of Christopher Lee Heard (student killed), the father/administrator and mother of Chad Powell (student killed), Matthew Robbins (student injured), Dominic Braus (student injuried) and his mother. In all, these six suits represent eleven (six killed, five injured) of the thirty-nine total victims of the Bonfire collapse.

[2] The University Officials include: Russell Thompson; Dr. J. Malon Southerland; Dr. William Kibler; Dr. John J Koldus, III; Dr. Ray M. Bowen; Dr. Kevin Jackson; Dr. Zack Coapland; Maj. Gen. M.T. Hopgood; Brig. Gen. Don Johnson; Maj. Rebecca Ray; Jim Reynolds; Robert Harry Stiteler; and Michael Krenz. Only Thompson, Bowen and Southerland are named as Defendants in all six suits. The remaining individuals are named as Defendants in *Self* only, or *Self* and *Comstock*. The Court will hereinafter refer to the University and the University Officials together as "Defendants."

[3] The *Self* and *Comstock* Plaintiffs have also asserted state law claims against a number of Defendants who, although intimately involved with the University, were not employed by the University at the time of the Bonfire collapse. The analysis in Part II and Part III of this Order pertains only to the merits of Plaintiffs' claims against the University and the University Officials; and in no way comments upon the validity of any Bonfire-related claim, filed by any Plaintiff, against any non-state actor Defendant.

they are immune from liability with respect to Plaintiffs' federal and state law claims and alternatively, that Plaintiffs have failed to state a viable cause of action upon which relief can be granted.[4] After very carefully and thoughtfully considering Defendants' well-prepared Motion, Plaintiffs' insightful Responses thereto, the lengthy record in this matter and the applicable law, the Court concludes that Defendants' Motion for Summary Judgment must be **GRANTED IN PART** with respect to Plaintiffs' federal law claims. For reasons set forth below, the Court need not reach the merits of Defendants' Motion for Summary Judgment with respect to Plaintiffs' allegations of negligence, as the Court respectfully declines to exercise supplemental jurisdiction over Plaintiffs' state law claims.[5]

I.

The following facts are primarily derived from the Final Report of the Special Commission on the 1999 Texas A&M Bonfire ("Final Report"). At this stage of the proceedings, the Parties have accepted the Final Report – the product of hundreds of hours of investigation and expert analysis – as an authoritative account of the history of Bonfire, the mechanics of the 1999 collapse and the factors that contributed to this far-reaching tragedy. The Court

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[4] Defendants' Motion for Summary Judgment incorporates the legal arguments and authorities contained within their Rule 12(b)(6) Motion to Dismiss, filed December 19, 2001.

[5] Several of the Plaintiffs are not asserting state law claims in the instant lawsuits, as they have already filed such claims in various state courts. Part IV of this Order, which pertains to the Court's supplemental jurisdiction, is therefore inapplicable to those Plaintiffs.

likewise adopts the Final Report as a definitive narrative of the relevant facts for purposes of its instant analysis. However, because the Court wishes to provide as comprehensive of a factual summary as possible, the following account also includes several facts gleaned from the summary judgment evidence.

The much loved and revered Texas A&M Bonfire tradition began humbly, with a burning trash heap in 1909. Over the ensuing ninety years, Bonfire grew into one of the most cherished traditions of Texas A&M University, uniting students, administrators, alumni and the surrounding community each September, October and November. The process of cutting trees into logs, stacking-the logs into a towering structure and preparing to ceremoniously burn the edifice on the eve of Texas A&M's annual football game with the University of Texas occupied over five thousand students for an estimated 125,000 hours each fall. At the culmination of these efforts, an estimated forty to eighty thousand individuals gathered annually to watch Bonfire ignite and burn. The University's students, or "Aggies," believe that Bonfire symbolizes their burning desire to "beat the hell out of t.u" at the next day's football game. It is symbolic not only of one school deeply rooted in tradition, but is representative of the entire Nation's passionate fascination with the most venerated aspects of collegiate football.

Bonfire may have started out as a pile of wood and trash, but by 1999, it had evolved into a massive structure with measurable technical complexity. The initial switch from trash to logs took place in the 1940s, when the students introduced a center pole and a teepee-shaped design. Because a teepee-shaped structure can only reach as high as its tallest log, the students began building

Bonfire with multiple layers of logs in the 1960s. The 1968 and 1969 Bonfires utilized this multi-tier design, with the 1969 Bonfire reaching 109 feet – the tallest Bonfire ever recorded. In the late 1970s, Bonfire began to take on a wedding cake-shaped design, with multiple cylindrical layers stacked one on top of the other. Since the 1980s, all Bonfires have been (1) built in the wedding cake design; (2) sixty to eighty feet tall; (3) six tiers bound with wire; (4) built around a two-part spliced center pole; and (5) surrounded by four perimeter poles with guy ropes. A completed 1990s Bonfire likely weighed over two million pounds. No other institution of higher learning in the world lays claim to a blazing bonfire of such monumental proportions, and it is an instantly recognizable source of pride and "fighting spirit" to past, present and future Aggies around the globe.

Even in light of Bonfire's massive proportions, its design and construction always remained almost the exclusive purview of the students. The "Redpots," student leaders between the ages of 19 and 21, controlled the Bonfire build year after year. The Repots were not licensed engineers or architects, lacked formalized construction training and were not required to attend classes on architectural design or building techniques. Moreover, Redpots possessed less than two months experience as "Junior Redpots" before being promoted to Redpots as seniors, failed to utilize blueprints and relied on building techniques that were passed down orally from their student predecessors. Yet Defendants entrusted the Redpots with the primary responsibility for erecting the enormous Bonfire each fall.

Defendants undoubtably recognized the dangers of Bonfire. In fact, one University document noted that "[i]t

is a well-established fact that Bonfire constitutes by far the single most liability laden student activity on campus." Other University documents warned that "Bonfire is, by its vary nature, a hazardous activity"; "Bonfire involves thousands of students engaged in a variety of activities, some of which involve potential risks and liability and therefore supervision is paramount"; and "[a]s we all are aware, Bonfire is a very risky undertaking from a safety and liability perspective." Blaine Lewis, a Junior Redpot, wrote in a 1997 paper that stacking the Bonfire's logs "has the potential for great tragedy at any time." Against this backdrop, the University purchased a two million dollar general liability insurance policy to insure against a catastrophic disaster on campus.

Nevertheless, very few truly significant restrictions were ever imposed, communicated or uniformly enforced to protect the safety of Bonfire participants. However, Defendants did not ignore Bonfire safety altogether. Faculty and staff frequently visited the Bonfire site for observation purposes. Defendants created the faculty post of "Bonfire Advisor," implemented a policy that restricted access to the Bonfire site during construction and intermittently passed other safety measures in response to particular "trigger" events. For instance, Defendants (1) imposed a fifty-five foot height restriction on Bonfire in response to fire hazard complaints; (2) required Bonfire participants to attend tree-cutting training programs after they received reports of cut-site accidents; (3) appointed an alcohol awareness committee and organized the "Don't Shatter the Tradition" campaign to combat excessive Bonfire-related drinking; and (4) prohibited students from riding in the back of pick-up trucks after a motor vehicle fatality. The Final Report characterizes this conduct as a "reactive risk

management model" and explains that Defendants only implemented very specific remedial measure in response to specific triggers. Apparently, no specific events or incidents triggered Defendants to query whether Bonfire was structurally unsound prior to 1999. Consequently, they never inquired into Bonfire's structural integrity; and therefore neglected to reexamine Bonfire's design prior to the collapse.

It can be reasonably argued that Defendants *should* have undertaken a study of Bonfire's structural soundness in 1994. That year, the partly constructed edifice suffered a partial collapse (or "lean") that should have alerted the State Defendants of Bonfire's instability. However, the 1994 mishap was attributed by those involved to wet and unstable ground, not structural integrity. In fact, those involved praised the structural integrity of the 1994 Bonfire because heavy equipment was needed to pull the stack apart. Consequently, the mishap failed to trigger a design re-examination. According to the Final Report, the "people obviously concerned with Bonfire safety, did in fact misinterpret these events and missed clear warning signs about structural integrity. This tunnel vision in decision [was] due . . . to a cultural bias in which legitimate courses of action outside past experience or contrary to the University's pre-disposition are often not considered. . . . More objective interpretations or more conservative interpretations, which might have led to a structural reassessment, could reasonably have been considered."

Regrettably, because of Defendants' reluctance to depart from or question "the way its always been," no one viewed the 1999 Bonfire as a potentially hazardous towering structure tenuously held together with wire. More significantly, no one proposed a sweeping reassessment of

Bonfire's construction process. And the results were catastrophic and heartbreaking. The 1999 Bonfire collapsed prior to completion, killing twelve students and injuring twenty-seven others, resulting in an enormous groundswell of grief and remorse which continues to reverberate to the deepest recesses of the worldwide Aggie community.

The Final Report characterizes the physical mechanics of the collapse as a "containment failure" in the first tier of logs, primarily caused by (1) excessive internal stresses driven primarily by aggressive wedging of second tier logs into the first tier; and (2) inadequate containment strength caused by insufficient binding support in the wiring used to tie the logs together. Moreover, the first stack of the 1999 Bonfire was not wrapped with steel cables, further reducing containment strength. Steel cables had been wrapped around the first tier as a matter of course for several years prior to 1999. The Final Report also identifies the overarching factors that brought about the physical collapse: the absence of a proactive risk management model; the University community's cultural bias impeding risk identification; the lack of student leadership knowledge and skills pertaining to structural integrity; and the lack of formal, written Bonfire design plans or construction methodology. Together, these factors created an environment wherein students were permitted to construct a complex and dangerous structure without adequate engineering supervision or physical safety controls and led to a complex organizational failure. The Bonfire collapse was not caused by a specific event, error or omission in 1999, but, rather, by decisions and actions taken by both students and University officials over many, many years.

II.

The Court will initially consider Plaintiffs' § 1983 claims against the University, before turning to Plaintiffs' claims against the University Officials. In their Motion for Summary Judgment, Defendants maintain that the University is entitled to summary judgment in its favor on the basis of Eleventh Amendment immunity. The Court agrees.

The University is a state-funded state institution of higher education. *See* Tex. Educ. Code § 86.02 (signifying that Texas A&M University was created by the laws of the State of Texas). Consequently, Plaintiffs are barred from bringing this suit against the University unless they are able to overcome the State's jurisdictional immunity in federal court, commonly referred to as "Eleventh Amendment" immunity.[6] *See Quern v. Jordan,* 440 U.S. 332, 341, 99 S. Ct. 1139, 1145, 59 L.Ed.2d. 358 (1979). Eleventh Amendment immunity prohibits actions against a state entity in federal court, unless either the state has waived its sovereign immunity or Congress, pursuant to another provision in the Constitution, has expressly abrogated the state's immunity. *See Will v. Mich. Dept. of State Police,* 491 U.S. 58, 66, 109 S. Ct. 2304, 2309-10, 105 L.Ed.2d 45 (1989); *Welch v. Tex. Dept. of Highways and Pub. Transp.,* 483 U.S. 468, 473-74, 107 S. Ct. 2941, 2946, 97 L.Ed.2d 389 (1987). A state's intention to waive its sovereign

[6] The Court notes that "Eleventh Amendment" immunity is not actually derived from the Eleventh Amendment to the Constitution. *See Alden v. Maine,* 527 U.S. 706, 713, 199 S. Ct. 2240, 2246, 144 L.Ed.2d 636 (1999) (explaining that the phrase "Eleventh Amendment immunity" is "convenient shorthand but, something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment.").

immunity must be "unequivocally expressed." *Stem v. Ahearn,* 908 F.2d 1, 4 (5th Cir. 1990) (citing *Port Authority Trans-Hudson Corp. v. Feeney,* 495 U.S. 299, 305-06, 100 S. Ct. 1868, 1873, 109 L.Ed.2d 264 (1990)). Significantly, Texas has not consented to be sued in federal court by individuals regarding the 1999 Bonfire collapse, nor has state sovereign immunity been abrogated or compromised by Congress with the passage of § 1983. The Supreme Court has held, in fact, that states are not "persons" subject to suit within § 1983's scope. *See Arizonans for Official English v. Ariz.,* 520 U.S. 43, 69, 117 S. Ct. 1055, 1069, 137 L.Ed.2d 170 (1997) (citing *Will,* 491 U.S. at 71, 109 S. Ct. at 2312); *see also Cronen v. Tex. Dept. of Human Servs.,* 977 F.2d 934, 936 (5th Cir. 1992); *Stem,* 908 F.2d at 4. Accordingly, the Court finds that the University is shielded from liability in this matter by its Eleventh Amendment immunity, as a matter of law.[7] Consequently, Defendants' Motion for Summary Judgment is hereby **GRANTED** with respect to Plaintiffs' federal law claims

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[7] Previous decisions of the Fifth Circuit and District Courts within the Southern District of Texas have consistently afforded Eleventh Amendment immunity to state universities, including Texas A&M. *See e.g., Tex. ex rel. Bd. of Regents of Univ. of Tex. Sys. v. Walker,* 142 F.3d 813, 820 n.10 (5th Cir. 1998) (citing *Regents of Univ. of Cal. v. Doe,* 519 U.S. 425, 429-31, 117 S. Ct. 900, 903-04, 137 L.Ed.2d 55 (1997) and *United Carolina Bank v. Bd. of Regents of Stephen F. Austin State Univ.,* 665 F.2d 553, 556-61 (5th Cir. 1981)); *Mangaroo v. Nelson,* 864 F.2d 1202, 1204 (5th Cir. 1989); *Gay Student Servs. v. Tex. A&M Univ.,* 737 F.2d 1317, 1333-334 (5th Cir. 1984); *Lowery v. Univ. of Houston-Clear Lake,* 82 F. Supp.2d 689, 693 (S.D. Tex. 2000); *Chacko v. Tex. A&M Univ.,* 960 F. Supp. 1180, 1197-198 (S.D. Tex. 1997); *Baldwin v. Univ. of Tex. Med. Branch at Galveston,* 954 F. Supp. 1022, 1030 (S.D. Tex. 1996); *Idoux v. Lamar Univ., Sys.,* 817 F. Supp. 637, 639-640 (E.D. Tex. 1993); *Zentgraf v. Tex. A&M Univ.,* 492 F. Supp. 265, 271-72 (S.D. Tex. 1980).

against the University and each and all of those claims are hereby **DISMISSED WITH PREJUDICE.**

III.

Plaintiffs also allege that the University Officials are liable for the harm that befell the Bonfire victims pursuant to § 1983.[8] In response, Defendants contend that Plaintiffs' § 1983 claim against the University Officials must be dismissed pursuant to Fed. R. Civ. P. 12(b)(6), or, alternatively, on qualified immunity grounds. The Court need not reach the qualified immunity issue, however, because Defendants correctly assert that a Rule 12(b)(6) dismissal is warranted.

Legal Standard for Rule 12(b)(6) Dismissal

The Federal Rules of Civil Procedure authorize a court, upon suitable showing, to dismiss any action or any claim within an action for failure to state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6). Put another way, Rule 12(b)(6) dismissal is appropriate when the "the plaintiff would not be entitled to relief under any set of facts or any possible theory that he could prove consistent with the allegations in his complaint." *Jones v. Greninger,* 188 F.3d 322, 324 (5th Cir. 1999); *see also* Fed. R. Civ. P. 12(b)(6). When making this determination, the Court accepts as true all well-pleaded allegations in the complaint, and views them in a light most favorable to the plaintiff. *See Malina v. Gonzales,* 994 F.2d 1121,

[8] Plaintiffs have sued the University Officials in their individual capacities only.

1125 (5th Cir. 1993). A plaintiff must plead specific facts in order to avoid dismissal for failure to state a claim and consequently, the Court will not accept conclusory allegations or unwarranted deductions of fact contained within the plaintiff's complaint as true. *See Tuchman v. DSC Communications Corp.,* 14 F.3d 1061, 1067 (5th Cir. 1994). Unlike a Motion for Summary Judgment, a Motion to Dismiss should be granted only when it appears without a doubt that the plaintiff can prove no set of facts in support of his claims that would entitle him to relief. *See Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80 (1957).

In considering a motion to dismiss for failure to state a claim, a district court must limit itself to the contents of the pleadings, including attachments thereto. *See* Fed. R. Civ. P. 12(b)(6). However, "[d]ocuments that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to [the plaintiff's] claims." *Collins v. Morgan Stanley Dean Whitter,* 224 F.3d 496, 498-99 (5th Cir. 2000) (citing *Venture Assoc. Corp. v. Zenith Data Sys. Corp.,* 987 F.2d 429, 431 (7th Cir. 1993)); *see also Chambers v. Time Warner, Inc.,* 282 F.3d 147, 153 (2d Cir. 2002); *Branch v. Tunnell,* 14 F.3d 449, 453-54 (9th Cir. 1994); *In re Securities Litigation BMC Software, Inc.,* 183 F. Supp. 2d 860, 883 (S.D. Tex. 2001); *Franks v. Prudential Health Care Plan, Inc.*, 164 F. Supp. 2d 865, 872 (S.D. Tex. 2001). By attaching documents that are integral to the plaintiff's claims, "the defendant merely assists the plaintiff in establishing the basis of the suit, and the court in making the elementary determination of whether a claim has been stated." *Collins,* 224 F.3d at 499. In these cases, the Complaints on file repeatedly refer to the Final Report;

and Plaintiffs' allegations are clearly based upon the findings contained therein. Accordingly, in reviewing Plaintiffs' federal claims under Rule 12(b)(6), the Court will equally consider the Plaintiffs' well-pleaded allegations and the facts set out in the Final Report.

42 U.S.C. § 1983

Section 1983 provides a cause of action against "[e]very person who, under color of any statute . . . of any State . . . subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws. . . ." 42 U.S.C. § 1983; *see also Moore v. Willis Indep. Sch. Dist.*, 233 F.3d 871, 874 (5th Cir. 2000) (citing *Leffall v. Dallas Indep. Sch. Dist.*, 28 F.3d 521, 525 (5th Cir. 1994)). "Rather than creating substantive rights, § 1983 simply provides a remedy for the rights that it designates." *Johnston v. Harris County Flood Control Dist.*, 869 F.2d 1565, 1573 (5th Cir. 1989). The assertion of an underlying constitutional or statutory violation is therefore a predicate to liability under § 1983. *See id.* In their attempt to establish federal liability against the University Officials, Plaintiffs premise their § 1983 claims upon an alleged substantive due process violation, arising from the "state created danger" theory.[9]

[9] Defendants initially argue that Plaintiffs' § 1983 claims must be dismissed because the state created danger theory was not well-settled law in this Circuit at the time of the Bonfire collapse. The Court rejects this argument, however because the Fifth Circuit's recent decision in *McClendon v. City of Columbia*, 258 F.3d 432 (5th Cir. 2001), explains that the state created danger theory was the law in this Circuit well-before 1999. *See id.* at 441 ("We conclude that . . . [on July 12, 1993] it

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State Created Danger Theory

In general, state governments are under no affirmative duty to provide protective services: "[T]he Due Process Clause generally confers no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty or property interests of which the government itself may not deprive the individual ... [Thus,] a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 196-97, 109 S. Ct. 998, 1003-04, 103 L.Ed.2d 249 (1989); *see also McClendon v. City of Columbia*, 258 F.3d 432, 436 (5th Cir. 2001); *Walton v. Alexander*, 44 F.3d 1297, 1302 (5th Cir. 1995) (*en banc*). Rather, the Constitution imposes a duty on the state to protect particular individuals only in "certain limited circumstances." *DeShaney*, 489 U.S. at 198, 109 S. Ct. at 1004. The Fifth Circuit has recognized two such limited scenario, namely, when the state has a special relationship with the person or when the state exposes a person to a danger of its own creation, or a "state created danger." *See McClendon*, 258 F.3d at 436. Plaintiffs do not argue that the University Officials had a special relationship with the

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was clearly established that a state actor creating a danger, knowing of that danger, and using his authority to create an opportunity for a third person to commit a crime that otherwise might not have existed, was subject to liability for a violation of the victim's rights."). The fact that the Fifth Circuit recently agreed to rehear *McClendon en banc* does not change the Court's conclusion. *McClendon* is the best authority currently available on this issue and the Court sees no reason to depart from its reasoning. On the assumption that this ruling will be appealed, the Parties are of course free to seek reassessment of the present state of the law. But any modification thereof is a policy consideration best left to the Fifth Circuit.

Bonfire victims, rather, they allege that the University Officials violated the Due Process Clause by failing to protect the victims from a state created danger.

The Fifth Circuit set out the two basic requirements of the state created danger theory in *Piotrowski v. City of Houston,* 51 F.3d 512 (5th Cr. 1995). A plaintiff asserting such a claim must show the (1) the state actors increased the danger to him or her; and (2) the state actors acted with deliberate indifference. *See id.* at 515; *see also McClendon,* 258 F.3d at 437; *Doe v. Hillsboro Indep. Sch. Dist.,* 113 F.3d 1412, 1415 (5th Cir. 1997); *Johnson v. Dallas Indep. Sch. Dist.,* 38 F.3d 198, 201 (5th Cir. 1994). Plaintiffs allege that the University Officials created a danger by failing to ensure the Bonfire's structural integrity. The facts surrounding the Bonfire collapse clearly tend to suggest that the conduct of the University Officials may have contributed, at least in part, to the 1999 Bonfire collapse. But *even if* the University Officials created an environment that was dangerous to the Bonfire victims (and the Court is expressly not now so finding), it is quite clear that they did not do so with "deliberate indifference" – the requisite culpability to make out a constitutional violation.[10]

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[10] Furthermore, *even if* the University Officials did create an environment that was dangerous to the Bonfire victims, that fact appears to be insufficient to satisfy the first requirement for the state created danger theory. The Final Report concluded that the students who were building the 1999 Bonfire (a group which includes the students who were killed and/or harmed) also played a role in the harm that befell them. None of the Fifth Circuit cases recognizing the state created danger doctrine have involved an incident for which the victims were partially at fault. Rather, the relevant cases have only recognized state created dangers where state actors created situations that increased the risk of danger from *third parties* to specific individuals.

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Deliberate Indifference

There is a significant distinction between a tort and a *constitutional* wrong. *Leffall,* 28 F.3d at 532 (citing *de Jesus Benavides v. Santos,* 883 F.2d 385, 388 (5th Cir. 1989)). The Supreme Court has made it clear that "[t]he Due Process Clause of the Fourteenth Amendment is not implicated by the lack of due care of an official causing unintended injury to life, liberty or property." *Davidson v. Canon,* 474 U.S. 344, 347, 106 S. Ct. 668, 670, 88 L.Ed.2d 677 (1986). Rather, reckless or grossly negligent conduct by state officials falls squarely within the ambit of traditional state tort law. *See de Jesus Benavides,* 883 F.2d at 388. Simply put, where a government official is merely negligent in causing the injury, no procedure for compensation is *constitutionally* required. *See Davidson,* 474 U.S. at 347, 106 S. Ct. at 670. Accordingly, the conduct of a state actor fails to violate a victim's right to substantive due process unless that conduct is carried out with deliberate indifference.

The Fifth Circuit defines "deliberate indifference" as "'a lesser form of intent' rather than a 'heightened form of negligence." *Leffall,* 28 F.3d at 531; *Doe v. Taylor Indep. Sch. Dist.,* 15 F.3d 443, 453 n13 (5th Cir. 1994) (explaining that deliberate indifference involves a higher degree of certainty than gross negligence). To establish deliberate indifference, "the environment created by the state actors must be dangerous; they must know it is dangerous; and . . . they must have used their authority to create an opportunity that would not otherwise have existed for the

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See, e.g. McClendon, 258 F.3d at 432; *Piotrowski v. City of Houston,* 51 F.3d at 512; *Johnson,* 38 F.3d at 198. On this basis alone, the state created danger theory *is le*gally inapplicable here.

. . . crime to occur." *Johnson,* 38 F.3d at 201. Deliberate indifference can arise from "tortious conduct exceeding mere negligence but not quite rising to the level of intentional, e.g. deliberate (or conscious) indifference, recklessness or gross negligence." *Salas v. Carpenter,* 980 F.2d 299, 307 (5th Cir. 1992). Essentially, "[t]he key to the state created danger cases . . . lies in the state actors' culpable knowledge and conduct in affirmatively placing an individual in a position of danger, effectively stripping a person of [his or] her ability to defend [himself or] herself, or cutting off potential sources of private aid." *Johnson,* 38 F.3d at 201 (quotations and citations omitted).

In *Johnson,* the Fifth Circuit noted that *Wood v. Ostrander,* 879 F.2d 583 (9th Cir. 1989), exemplifies the state created danger theory of liability. In that case, a police officer arrested a drunken driver and impounded his car, leaving the driver's female passenger alone at night, without any means of getting home, in an area notorious for criminal activity. She was subsequently raped by a stranger who offered her a ride. *See id.* at 586. Other cases applying the state created danger theory are to a similar effect. *See, e.g. Dwares v. City of New York,* 985 F.2d 94, 99 (2d Cir. 1993) (holding that it would violate due process for police officers to conspire with and sanction violence by "skinheads" against persons burning American flags); *L.W. v. Grubbs,* 974 F.2d 119, 121-22 (9th Cir. 1992) (holding that § 1983 plaintiff had stated a claim by alleging that she was a nurse employed by the state, that her supervisors had instructed her to work alone with a known sex offender after leading her to believe that she would not be made to work under such conditions and that she had been assaulted by the sex offender while alone with him); *Freeman v. Ferguson,* 911 F.2d 52 (8th Cir. 1980) (finding a

viable § 1983 claim where a woman was killed by her estranged husband after the chief of police had directed his officers to ignore her pleas that they stop the husband, who was the police chief's friend, from threatening and intimidating her); *White v. Rochford,* 592 F.2d 381, 382-83 (7th Cir. 1979) (finding that two small children stated a § 1983 claim by alleging that police officers arrested their uncle and left them unattended in a car on the side of the freeway). In light of these authorities, the Court emphasizes that deliberate indifference arises in cases involving conduct that is substantially more abhorrent, and significantly more detestable, than even gross negligence.

The conduct of the University Officials does not rise to such a level, as a matter of law. As demonstrated by the Final Report, there is *no* evidence that the University Officials were aware of the impending Bonfire collapse. To the contrary, the Final Report concluded that "[n]o one in the [University's] administration ever interpreted ongoing behavioral problems as indications that safe Bonfire design and construction was beyond the capabilities of student leaders." Nor do the facts suggest that the University Officials directly prevented increased Bonfire safety or opposed a review of Bonfire's structural integrity. They simply failed to recognize that change was desperately needed. They built Bonfire the way that it had always been built and the way that it had always succeeded. For them, Bonfire was, and is, an institution. And, as stated in the Final Report, "leaders do not change institutions unless there is a clearly perceived need to do so."

The record presently before the Court amply demonstrates that the University Officials were aware of the dangers posed by Bonfire. Consequently, it can be persuasively argued that they may have acted negligently,

possibly even grossly so, and that the Bonfire collapse could have been prevented had cautionary measures been implemented. However, despite their knowledge of Bonfire's extremely risky nature and their failure to proactively avert or reduce those risks, the evidence equally shows that the University Officials were unaware of the *precise* risk at hand – the risk that the entire Bonfire would come tumbling down. Rather, the University Officials believed that ninety years of successful Bonfire building experience was enough in itself to ensure that the tradition would safely continue. Although the University Officials' lack of awareness might appear naive, and possibly even foolish, in retrospect, it cannot support a finding of deliberate indifference. This is not a case in which state actors "brought the victim into close proximity with a specific individual known to be likely to commit violence, . . . or abandoned the victim in a highly dangerous environment, . . . or conspired with [a] private actor who inflicted the deprivation." *Leffall,* 28 F.3d at 531. Plaintiffs concede that the University Officials took *some* measures to ensue Bonfire safety (i.e. height restriction, appointment of a Bonfire advisor, tree-cutting training program, alcohol awareness committee, prohibition against riding in the back of pick-up trucks). Simply put, because the University Officials were indeed concerned with Bonfire Safety (albeit, in hindsight, not concerned enough, or in precisely the right way), the Court cannot conclude that their conduct rose to the egregious level of a constitutional violation, as a matter of law.[11] *See id.* at

[11] The Court acknowledges that the existence of deliberate indifference is often a factual determination. However, because the Final Report affirmatively discloses that the University Officials in this case lacked the requisite culpability with respect to the alleged

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531-32 (concluding that even if school officials' decision to sponsor dance at high school, despite awareness of dangers posed thereby, was negligent, such conduct did not rise to the level of deliberate indifference to the rights of a student who was killed by random gunfire in the school parking lot after the dance); *Doe,* 15 F.3d at 456 n.12 (observing that "good faith but ineffective responses" by state actors tend to defeat claims of deliberate indifference). In reaching this conclusion, the Court in no way condones the reactive risk management policy of the University Officials or their cultural bias against departing from tradition in favor of newer safer measures. Rather, the Court recognizes the distinction between state law torts and constitutional wrongs. Expanding the substantive due process clause to encompass the allegations at issue here would violate well-settled principles of constitutional law and expand the protections of the Fourteenth Amendment beyond their appointed boundaries. Therefore, because Plaintiffs fail to allege, and cannot allege, a cognizable substantive due process violation, as a matter of law, Plaintiffs' § 1983 claims against the University Officials warrant dismissal pursuant to Fed. R. Civ. P. 12(b)(6). Defendants' Motion for Summary Judgment is therefore **GRANTED** with respect to Plaintiffs' federal law claims against the University Officials and each and all of such claims are hereby **DISMISSED WITH PREJUDICE.**

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violation of the Bonfire victims' constitutional rights, it is not only appropriate, but mandatory in this instance to conclude that the University Officials failed to act with deliberate indifference, as a matter of law.

IV.

Having dismissed all of Plaintiffs' federal law claims, the Court is now faced with six negligence lawsuits governed purely by state tort law. Thus, the Court must decide whether to retain supplemental jurisdiction over Plaintiffs' remaining claims. In evaluating this matter, the Court is guided by the supplemental jurisdiction statute, 28 U.S.C. § 1367. Section (a) of that statute provides that "in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to the claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). Section (c) of the statute refines the supplemental jurisdiction doctrine by enumerating four circumstances in which District Courts have discretion to decline supplemental jurisdiction over state law claims: (1) when the state law claims raise novel or complex issues of state law; (2) when the state law claims substantially predominate over the claims within the district court's original jurisdiction; (3) when the district court dismisses the claims over which it has original jurisdiction; and (4) in exceptional circumstances, if there are other compelling reasons for declining jurisdiction. 28 U.S.C. § 1367(c). In this case, the third factor enumerated in § 1367(c) is clearly present, and to only a slightly lesser extent, the second and fourth factors as well. The Court has dismissed all of the claims that were within the Court's original jurisdiction and only Plaintiffs' state law claims remain. And those claims are manifestly better suited for resolution by a state court, applying squarely applicable state law, in front of a jury of state citizens. Accordingly, the

Court respectfully declines to exercise its supplemental jurisdiction over Plaintiffs' state law claims. *See Noble v. White,* 996 F.2d 385, 395 (5th Cir. 1993) ("District courts enjoy wide discretion in determining whether to retain supplemental jurisdiction over a state law claim once all federal claims are dismissed"); *Rhyne v. Henderson,* 973 F.2d 386, 395 (5th Cir. 1992) ("The district court has properly dismissed all of the federal questions that gave it original jurisdiction in this case. Therefore, we find that the district court's dismissal of the state law claims was proper under 28 U.S.C. § 1367(c)"); *see also United Mine Workers of Am. v. Gibbs,* 383 U.S. 715, 726, 86 S. Ct. 1130, 1139, 16 L.Ed.2d 218 (1966) ("Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of the applicable law."). As such, Plaintiffs' state law claims are hereby **DISMISSED WITHOUT PREJUDICE.** Plaintiffs are free to re-file their state law claims against Defendants in state court, if they so desire, either by filing new actions or by seeking leave to intervene in the state cases that are already well underway. In doing so, Plaintiffs are of course subject to the applicable limitations requirements.[12] All Parties are to bear their own taxable costs, expenses and attorneys' fees incurred herein to date; and all other pending Motions, filed by any of the Parties to this litigation, are hereby **DENIED** as moot.

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[12] For the same reasons, the Court also declines to exercise supplemental jurisdiction over the *Self* and *Comstock* Plaintiffs' state law claims against the non-state actor Defendants. Thus, those claims are likewise **DISMISSED WITHOUT PREJUDICE**, rather to proceed in either new or extant state court litigation, as appropriate.

IT IS SO ORDERED.

DONE this 23rd day of July, 2002, at Galveston, Texas.

/s/ Samuel B. Kent
SAMUEL B. KENT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

JAMES KIMMEL, Individually and as Representative of the Estate of LUCAS KIMMEL & WALIETA KIMMEL,	§	
Plaintiffs,	§	CIVIL ACTION NO. G-01-719
J. MALON SOUTHERLAND, et al.	§	
Defendants.	§	

FINAL JUDGMENT

(Entered May 24, 2004)

Pursuant to the Court's Order Granting Defendants' Renewed Motion for Summary Judgment, entered this date, all claims brought by Plaintiffs against Defendants are hereby **DISMISSED WITH PREJUDICE**. All relief not herein provided is expressly **DENIED**. All Parties are **ORDERED** to bear their own costs, attorneys' fees, and expenses incurred herein to date. **THIS IS A FINAL JUDGMENT.**

IT IS SO ORDERED.

DONE this 21st day of May 2004, at Galveston, Texas.

/s/ Samuel B. Kent
SAMUEL B. KENT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

JAMES KIMMEL, Individually and as Representative of the Estate of LUCAS KIMMEL & WALIETA KIMMEL,	§	
Plaintiffs,	§	CIVIL ACTION NO. G-01-719
J. MALON SOUTHERLAND, et al.	§	
Defendants.	§	

ORDER GRANTING DEFENDANTS' RENEWED MOTION FOR SUMMARY JUDGMENT

(Entered May 24, 2004)

This lawsuit arises out of the tragic collapse of the Texas A&M Bonfire ("Bonfire") in the early hours of November 18, 1999, which killed twelve students and injured an additional twenty-seven. Now before the Court comes the Defendants' Renewed Motion for Summary Judgment. Because Defendants are entitled to qualified immunity from suit, the Motion is hereby **GRANTED**.

I. Background

The facts of this case have previously been laid out by this Court and the Fifth Circuit, and the Court will not repeat them in this Order. This action is one of six virtually identical lawsuits[1] now pending before the Court.

[1] The Court is issuing this Order in all six lawsuits, which are styled as *Breen v. Tex. A&M Univ., et al.*, No. G-01-CV-270 (S.D. Tex. filed Oct. 24, 2001); *Comstock v. Tex. A&M Univ., et al.*, No. G-01-CV-

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Plaintiffs allege that various former and present high-level employees of Texas A&M University[2] ("University Officials" or "Defendants") deprived the Bonfire victims of their Fourteenth Amendment right to substantive due process by acting with deliberate indifference to the state-created danger that killed or injured them. Plaintiffs further alleged violations of Texas law. In an Order dated July 23, 2002, the Court dismissed all of Plaintiffs' federal claims pursuant to Fed. R. Civ. P. 12(b)(6). The Court declined to exercise supplemental jurisdiction over Plaintiffs'

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730 (S.D. Tex. filed Nov. 19, 2001); *Davis v. Tex. A&M Univ. et al.*, No. G-01-CV-720 (S.D. Tex. filed Nov. 16, 2001); *Kimmel v. Tex A&M Univ., et al.*, No. G-01-CV-719 (S.D. Tex. filed Nov. 16, 2001); *Scanlan v. Tex. A&M Univ., et al.*, No. G-01-CV-733 (S.D. Tex. filed Nov. 19, 2001); and *Self et al. v. Tex. A&M Univ., at al.*, No. G-01-CV-721 (S.D. Tex. filed Nov 16, 2001). The Plaintiffs are, in *Breen*, the brother/administrator and parents of Christopher Breen, a former student killed in the collapse; in *Comstock*, John Andrew Comstock, the most severely injured surviving victim of the collapse, and his mother; in *Davis*, Bill Davis, one of the students injured in the collapse; in *Kimmel*, the estate and parents of Lucas Kimmel, one of the students killed in the collapse; in *Scanlan*, Lauren Scanlan, one of the students injured in the collapse, and her parents; and in *Self*, the mother/administrator of Jerry Don Self (student killed), the mother/administrator and father of Bryan McClain (student killed), the father/administrator and mother of Christopher Lee Heard (student killed), the father/administrator and mother of Chad Powell (student killed), Matthew Robbins (student injured), Dominic Braus (student injured) and his mother. In all, these six suits represent eleven (six killed, five injured) of the thirty-nine total victims of the Bonfire collapse.

[2] The University Officials include: Russell Thompson; Dr. J. Malon Southerland; Dr. William Kibler; Dr. John J. Koldus, III; Dr. Ray M. Bowen; Dr. Kevin Jackson; Dr. Zack Coapland; Maj. Gen. M.T. Hopgood; Brig. Gen. Don Johnson; Maj. Rebecca Ray; Jim Reynolds; Robert Harry Stiteler; and Michael Krenz. Only Thompson, Bowen, and Southerland are named as Defendants in all six suits. The remaining individuals are named as Defendants in *Self* only, or *Self* and *Comstock*. The Court will hereinafter refer to the University Officials as "Defendants".

state-law claims, and the dismissal of those claims without prejudice was not appealed. Plaintiffs' claims against the University were dismissed on Eleventh Amendment immunity grounds, and no Plaintiff appealed that ruling. Plaintiffs' claims against the University Officials were dismissed after a determination that their actions did not rise to the level of deliberate indifference as a matter of law. It is that ruling that was appealed to the Fifth Circuit Court of Appeals. On August 19, 2003, the Fifth Circuit reversed this Court's findings as to the University Officials and remanded the case for further consideration consistent with its instructions. *See Scanlan v. Tex. A&M Univ.,* 343 F.3d 533 (5th Cir. 2003). The Court of Appeals found that this Court impermissibly relied upon the Final Report of the Special Commissioners on the 1999 Texas A&M Bonfire ("the Final Report"). *See id.* at 538. The Circuit found that without consideration of the Final Report, and construing allegations in a light most favorable to Plaintiffs, the University Officials were not entitled to a dismissal of the claims against them. *See id.* Upon remand, Plaintiffs renewed their Motions for Summary Judgment, which were originally filed in May of 2002. After additional briefing by both sides, those Motions are now ripe for consideration.

II. Summary Judgment Standard

Summary judgment is appropriate if no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S. Ct. 2548, 2552-53, 91 L. Ed. 2d 265 (1986). When one party moves for summary judgment, the nonmoving party must set forth specific facts showing that there is a genuine

issue for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986). Issues of material fact are "genuine" only if they require resolution by a trier of fact. *See id.* at 248, 106 S. Ct. 2510. The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; rather, only disputes over facts that might affect the outcome of the lawsuit under governing law will preclude the entry of summary judgment. *See id.* at 247-48, 106 S. Ct. 2510. Nevertheless, if the evidence is such that a reasonable fact-finder could find in favor of the nonmoving party, summary judgment should not be granted. *See id.*; *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986). Determining credibility, weighing evidence, and drawing reasonable inferences are left to the trier of fact. *See Anderson*, 477 U.S. at 255, 106 S. Ct. 2513.

III. Qualified Immunity Standard

The University Officials assert that they are entitled to qualified immunity against suit, and the claims against them should be dismissed. "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). "When a defendant invokes qualified immunity, the burden is on the plaintiff to demonstrate the inapplicability of the defense." *McClendon v. City of Columbia*, 305 F.3d 314, 323 (5th Cir. 2002). The University Officials' right to qualified

immunity should be determined through the application of a two-prong test. *See Saucier v. Katz,* 533 U.S. 194, 200, 121 S. Ct. 2151, 2155, 150 L. Ed. 2d 272 (2001); *Mace v. City of Palestine,* 333 F.3d 621, 623 (5th Cir. 2003). The first question is whether the facts alleged, considered in a light most favorable to Plaintiffs, show that the University Officials' conduct violated a constitutional right. *Mace,* 333 F.3d at 623. If so, the Court must determine whether that right was clearly established at the time it was violated. That is, would it have been clear to a reasonable person that the Officials' conduct was unlawful under the circumstances? *Id.* at 624. Though it is necessary to consider the prongs in the order presented, the Court may find it necessary to lay out the factors that will aid it in determining whether the right was clearly established in the course of determining whether a constitutional violation actually exists. *See Saucier,* 533 U.S. at 201, 121 S. Ct. 2156.

A. Did the University Officials Violate Plaintiffs' Constitutional Rights?

Determining whether the University Officials violated Plaintiffs' constitutional rights requires two separate analyses: (1) is the right Plaintiffs claim a **constitutional** one; and (2) was that right actually violated? The Court first considers the nature of the right that Plaintiffs are claiming and then examines whether the facts as presented in the Summary Judgment evidence show a violation.

1. Do Plaintiffs claim a constitutional right?

Plaintiffs assert claims under 42 U.S.C. § 1983, which provides a cause of action against "[e]very person who, under color of any statute . . . of any State . . . subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and the laws . . . " 42 U.S.C. §1983. "Rather than creating substantive rights, § 1983 simply provides a remedy for the rights that it designates." *Johnston v. Harris County Food Control Dist.*, 869 F.2d 1565, 1573 (5th Cir. 1989). The assertion of an underlying constitutional or statutory violation is therefore a predicate to liability under § 1983. *See id.* In their attempt to establish federal liability against the University Officials, Plaintiffs premise their § 1983 claims upon an alleged substantive due process violation arising from the "state-created danger" theory.

In general, state governments are under no affirmative duty to provide protective services: "[T]he Due Process Clause generally confers no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty or property interests of which the government itself may not deprive the individual." *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 196-97, 109 S. Ct. 998, 1003-04, 103 L. Ed. 2d 249 (1989). "[A] State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *Id.* at 197, 109 S. Ct. 1004; *see also Walton v. Alexander,* 44 F.3d 1297, 1302 (5th Cir. 1995) (en banc). The Constitution imposes a duty on the state to protect particular individuals only in "certain limited circumstances." *DeShaney,* 489 U.S. at 198, 109 S. Ct. 1004. Courts have recognized two such limited

scenarios: (1) when the state has a special relationship with the person; or (2) when the state exposes a person to a danger of its own creation – a "state-created danger." *See Piotrowski v. City of Houston,* 51 F.3d 512, 516 (5th Cir. 1995) (*"Piotrowski I"*) (citing *Salas v. Carpenter,* 980 F.2d 299, 307 (5th Cir. 1992)). Plaintiffs do not argue that the University Officials had a special relationship with the Bonfire victims; rather, they allege that by failing to ensure Bonfire's structural integrity, the University Officials violated the Due Process Clause by failing to protect the victims from a state-created danger.

The validity of the state-created danger theory is uncertain in the Fifth Circuit. Most recently, the Court of Appeals has noted: "We have never recognized state-created danger as a trigger of State affirmative duties under the Due Process Clause. We again decline to do [so]." *Rivera v. Houston Indep. Sch. Dist.,* 349 F.3d 244, 249 (5th Cir. 2003). However, the Fifth Circuit has on numerous occasions recognized and discussed the existence and elements of the doctrine as well as its acceptance in other Circuits. *See Randolph v. Cervantes,* 130 F.3d 727 (5th Cir. 1997); *Doe v. Hillsboro Indep. Sch. Dist.,* 113 F.3d 1412 (5th Cir. 1997); *Piotrowski I,* 51 F.3d 512; *Johnson v. Dallas Indep. Sch. Dist.,* 38 F.3d 198 (5th Cir. 1994); *Lefall v. Dallas Indep. Sch. Dist.,* 28 F.3d 521 (5th Cir. 1994); *Salas,* 980 F.2d at 307. In fact, in *Scanlan,* the Fifth Circuit expressly noted that "the district court should have concluded that the plaintiffs stated a section 1983 claim under the state-created danger theory." *Scanlan,* 343 F.3d at 538. In accordance with the Fifth Circuit's instructions in this case, the Court will consider Plaintiffs' claims of a state-created danger as if the theory is valid one. Accordingly, for purposes of further analysis,

the Court will proceed under the conclusion that the violations Plaintiffs claim are indeed constitutional ones.

2. Were Plaintiffs' rights violated?

The Fifth Circuit has laid out the requirements a Plaintiff must meet in order to qualify for relief under the state-created danger theory. *See Piotrowski I,* 51 F.3d at 515. "First, a plaintiff must show that the state actors increased the danger to her. Second, a plaintiff must show that the state actors acted with deliberate indifference." *See id.; Doe,* 113 F.3d at 1415; *Johnson,* 38 F.3d at 201. Plaintiffs ultimately allege that the University Officials increased the danger to the victims by affirmatively delegating technical and complex Bonfire responsibilities to unqualified students without adequate supervision or guidelines. Defendants maintain that they "passively continued the status quo" and merely permitted students to do what they wanted. The resolution of these polar viewpoints requires examination of literally hundreds of facts. It would be inappropriate and virtually impossible for the Court to decide as a matter of law and based on the record now before the Court whether the state actors increased the danger to the Bonfire victims. Defendants are not entitled to summary judgment based on qualified immunity on the grounds that they did not increase the danger to the victims.

The Court's next analysis considers whether Defendants acted with deliberate indifference. There is a significant distinction between a tort and a *constitutional* wrong. *See Lefall,* 28 F.3d at 532 (citing *de Jesus Benavides v. Santos,* 883 F.2d 385, 388 (5th Cir. 1989)). The Supreme Court has made it clear that "[t]he Due Process Clause of

the Fourteenth Amendment is not implicated by the lack of due care of an official causing unintended injury to life, liberty or property." *Davidson v. Canon,* 474 U.S. 344, 347, 106 S. Ct. 668, 670, 88 L. Ed. 2d 677 (1986). Where a government official is merely negligent in causing the injury, no procedure for compensation is *constitutionally* required. *See id.* at 347, 106 S. Ct. 670. Even reckless or grossly negligent conduct by state officials falls squarely within the ambit of traditional state tort law. *See de Jesus Benavides,* 883 F.2d at 388. Accordingly, the conduct of a state actor does not violate a victim's right to substantive due process unless that conduct is carried out with deliberate indifference.

The Fifth Circuit defines "deliberate indifference" as "'a lesser form of intent' rather than a 'heightened form of negligence.'" *Lefall,* 28 F.3d at 531; *Doe v. Taylor Indep. Sch. Dist.,* 15 F.3d 443, 453 n.13 (5th Cir. 1994) (explaining that deliberate indifference involves a higher degree of certainty than gross negligence). To establish deliberate indifference, "the environment created by the state actors must be dangerous; they must know it is dangerous; and . . . they must have used their authority to create an opportunity that would not otherwise have existed for the . . . crime to occur." *Johnson,* 38 F.3d at 201. Deliberate indifference can arise from "tortious conduct exceeding mere negligence but not quite rising to the level of intentional, e.g. deliberate (or conscious) indifference, recklessness or gross negligence" *Salas,* 980 F.2d at 307. Essentially, "[t]he key to the state created danger cases . . . lies in the state actors' culpable knowledge and conduct in affirmatively placing an individual in a position of danger, effectively stripping a person of [his or] her ability to defend [himself or] herself; or cuffing off potential sources

of private aid." *Johnson,* 38 F.3d at 201 (quotations and citations omitted).

In this case, Plaintiffs argue that Defendants deliberately ignored the possible dangers of Bonfire in an effort to avoid future liability. Defendants allege that they never knew or could have known that the Bonfire might collapse and therefore cannot be held liable under a deliberate indifference standard. In its Opinion in this case, the Fifth Circuit stated: "Whether deliberately delegating the construction of the bonfire stack to students the University Officials allegedly knew were not qualified to handle such a dangerous project, and whether deliberately providing no supervision to students building the bonfire even though they knew the students were not qualified to build the stack, constituted deliberate indifference presents fundamental questions of material fact." *Scanlan,* 343 F.3d at 539. Though this statement was made in an Opinion disposing of Defendants' Motion to Dismiss, the summary judgment evidence submitted since then has only muddied the waters further. At this stage in the proceedings, there remain multiple questions of fact as to whether Defendants acted with deliberate indifference. The existence of these questions prevents the Court from deciding whether Defendants did or did not act with deliberate indifference as a matter of law.

B. Was Defendants' Conduct Objectively Reasonable in Light of Clearly Established Law?

Notwithstanding the Court's conclusion that there exists a genuine issue of material fact concerning Defendants' violation of Plaintiffs' due process-based right to be free from state-created danger, Defendants are

entitled to qualified immunity if their conduct was "objectively reasonable in light of the legal rules that were clearly established at the time of [their] actions." *McClendon,* 305 F.3d at 323. As noted above, the Circuit has recognized an individual's substantive due process right to be free from state-created danger. *See Scanlan,* 343 F.3d at 538 (holding that this Court "should have concluded that the plaintiffs stated a section 1983 claim under the state-created danger theory"). By holding that Plaintiffs stated a claim upon which relief could be granted, the Circuit necessarily recognized as valid the theory of relief behind Plaintiffs' claims.[3]

Under qualified immunity analysis, the Court must determine whether the right to be free from state-created danger was clearly established under the Due Process Clause at the time of the events and activities in question. The Fifth Circuit first considered a state-created danger claim in *Salas v. Carpenter,* 980 F.2d 299 (5th Cir. 1992), a case involving a court clerk who was taken hostage and eventually killed by her estranged husband in the Tarrant County courthouse. The plaintiffs claimed that the Sheriff deprived the victim of her life by preventing the Police Department's SWAT and hostage negotiation teams from

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[3] In the Court's understanding of Fifth Circuit due process jurisprudence, *Scanlan* charts a new course by affirmatively recognizing the state-created danger theory for the first time. In a later decision, however, the Fifth Circuit expressly disavowed *Scanlan's* apparent recognition of the state-created danger theory. *See Rivera,* 349 F.3d at 249 n.5 ("Despite remanding that case to the district court for further proceedings, we did not recognize the state-created danger theory."). Because the second prong of the qualified immunity inquiry focuses on the state of the law at the time of the activities underlying this lawsuit, however, this development does not materially affect Plaintiffs' claims.

securing her release and by using incompetent hostage negotiators. *Id.* at 303. The Fifth Circuit held that the sheriff had not violated a constitutional right as a matter of law because, unlike the state officials in other state-created danger cases, the sheriff did not "worsen [the victim's] position and abandon her to allow events to run their course." *Id.* at 309. In *McClendon,* decided ten years after *Salas,* the en banc Fifth Circuit stated that *Salas* "did not address the viability of the state-created danger theory"; therefore, *Salas* "would not have provided a reasonable officer with 'fair warning' that creating or increasing a danger to a known victim with deliberate indifference towards that victim violates the victim's substantive due process rights." *McClendon,* 305 F.3d at 330. In other words, the Fifth Circuit's discussion of the state-created danger theory in *Salas* did not clearly establish the right to be free from state-created danger.

The Fifth Circuit recognized in *McClendon* that many circuits have read *DeShaney* to mean that the Due Process Clause imposes an affirmative duty upon state officials to protect an individual from third-party violence "if the state actor played an affirmative role in creating or exacerbating a dangerous situation that led to the individual's injury." *McClendon,* 305 F.3d at 324. The Circuit specifically noted, however, that it had not recognized the state-created danger theory. *See id.* at 325 ("[W]e have not yet determined whether a state official has a similar duty to protect individuals from state-created dangers.") (citing *Piotrowski v. City of Houston,* 237 F.3d 567, 584 (5th Cir. 2001) *("Piotrowski II"); Randolph,* 130 F.3d at 731). In the *McClendon* court's assessment, the Fifth Circuit's reluctance to endorse the state-created danger theory in the period since *Salas* suggested that "a reasonable officer in

this Circuit would, even today, be unclear as to whether there is a right to be free from 'state-created danger.' *Id.* at 332 n.12; *cf. Rivera,* 349 F.3d at 249 ("We have never recognized state-created danger as a trigger of State affirmative duties under the Due Process clause. We again decline to do [so].") (citation and footnote omitted). *McClendon* highlights the significance of the Fifth Circuit's treatment of this question. The Circuit has not merely declined to recognize the state-created danger theory of substantive due process; it has scrupulously avoided it for more than ten years. The Fifth Circuit's reluctance to adopt the state-created danger theory is therefore not a mere neutral factor to be considered against the general consensus among other circuits, but a warning that the Fifth Circuit might not join that consensus.[4]

The Court therefore concludes that the state-created danger theory of substantive due process was not clearly established at the time of Defendants' Bonfire-related activities. Because Plaintiffs' theory had not been adopted as a viable avenue to a substantive due process claim, a reasonable school official would not have been aware that the Fourteenth Amendment's Due Process Clause provided a constitutional right to be free from state-created danger, much less that an injury caused by a school administrator's failure to exercise control over an activity such as Bonfire would violate that right. Accordingly, Defendants

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[4] As the *McClendon* Court put it, "a strong consensus of authorities in other circuits is more likely to be determinative on a subject when this circuit is *tabula rasa* on that subject than when the landscape in this circuit is littered with opinions expressing varying levels of skepticism." *McClendon,* 305 F.3d at 332 n.12.

are entitled to qualified immunity from Plaintiffs' § 1983 claims.

IV. Conclusion

For the reasons articulated above, Defendants' Renewed Motion for Summary Judgment is hereby **GRANTED**. All claims against the University Officials are **DISMISSED WITH PREJUDICE**. All Parties are to bear their own taxable costs, expenses, and attorneys' fees incurred herein to date. A Final Judgment will be issued concurrently with this Order.

IT IS SO ORDERED.

DONE this 21st day of May, 2004, at Galveston. Texas

/s/ Samuel B. Kent
SAMUEL B. KENT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

JAMES KIMMEL, as	§	
administrator of the estate	§	
of LUCAS KIMMEL,	§	
JAMES KIMMEL and	§	
WALIETA KIMMEL	§	CIVIL ACTION
Plaintiffs	§	NO. G-01-719
	§	
v.	§	
	§	
TEXAS A&M UNIVERSITY	§	
et al	§	

FINAL JUDGMENT

(Entered Jul. 23, 2002)

Pursuant to the Court's Order Dismissing Plaintiffs' Federal Law Claims with Prejudice and Dismissing Plaintiffs' State Law Claims without Prejudice, each and all federal law claims brought by Plaintiffs against Texas A&M University and the individuals employed by the University are hereby **DISMISSED WITH PREJUDICE.** Pursuant to that same Order, each and all state law claims brought by Plaintiffs against the individuals employed by the University are hereby **DISMISSED WITHOUT PREJUDICE.** All relief not herein provided is expressly **DENIED**. All Parties are **ORDERED** to bear their own costs and attorney's fees incurred herein to date. **THIS IS A FINAL JUDGMENT.**

IT IS SO ORDERED.

DONE this 23rd day of July, 2002, at Galveston, Texas.

/s/ Samuel B. Kent
SAMUEL B. KENT
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

JAMES KIMMEL, as administrator of the estate of LUCAS KIMMEL, JAMES KIMMEL and WALIETA KIMMEL Plaintiffs	§	CIVIL ACTION NO. G-01-719
v.	§	
TEXAS A&M UNIVERSITY *et al*	§	

ORDER DISMISSING PLAINTIFFS' FEDERAL LAW CLAIMS WITH PREJUDICE AND DISMISSING PLAINTIFFS' STATE LAW CLAIMS WITHOUT PREJUDICE

(Entered Jul. 23, 2002)

The Texas A&M Bonfire ("Bonfire") tragically collapsed in the early hours of November 18, 1999, killing twelve students and injuring an additional twenty-seven. This action is one of six virtually identical lawsuits[1] now

[1] The Court is issuing this Order in all six lawsuits, which are styled as *Breen v. Tex. A&M Univ., et al.*, No. G-01-CV-670 (S.D. Tex. filed Oct. 24, 2001); *Comstock v. Tex. A&M Univ., et al.*, No. G-01-CV-730 (S.D. Tex. filed Nov. 19, 2001); *Davis v. Tex. A&M Univ., et al.*, No. G-01-CV-720 (S.D. Tex. filed Nov. 16, 2001); *Kimmel v. Tex. A&M Univ., et al.*, No. G-01-CV-719 (S.D. Tex. filed Nov. 16, 2001); *Scanlan v. Tex. A&M Univ., et al.*, No. G-01-CV-733 (S.D. Tex. filed Nov. 19, 2001); and *Self, et al. v. Tex. A&M Univ., et al.*, No. G-01-CV-721 (S.D. Tex. filed Nov. 16, 2001). The Plaintiffs are, in *Breen*, the brother/administrator and parents of Christopher Breen, a former student killed in the collapse; in *Comstock*, John Andrew Comstock, the most severely injured surviving victim of the collapse, and his mother; in *Davis*, Bill

(Continued on following page)

pending before the Court wherein the Plaintiffs allege that Texas A&M University ("the University") and various former and present high-level University employees[2] ("University Officials") violated 42 U.S.C. § 1983 when they deprived the Bonfire victims of their Fourteenth Amendment right to substantive due process by acting with deliberate indifference to the state created danger that killed or injured them. Plaintiffs further allege that Defendants negligently harmed the victims in violation of Texas state law.[3] On May 24, 2002, Defendants filed a

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Davis, one of the students injured in the collapse; in *Kimmel* the estate and parents of Lucas Kimmel, one of the students killed in the collapse; in *Scanlan*, Lauren Scanlan, one of the students injured in the collapse, and her parents; and in *Self*, the mother/administrator of Jerry Don Self (student killed), the mother/administrator and father of Bryan McClain (student killed); the father/administrator and mother of Christopher Lee Heard (student killed), the father/administrator and mother of Chad Powell (student killed), Matthew Robbins (student injured), Dominic Braus (student injured) and his mother. In all, these six suits represent eleven (six killed, five injured) of the thirty-nine total victims of the Bonfire collapse.

[2] The University Officials include: Russell Thompson; Dr. J. Malon Southerland; Dr. William Kibler; Dr. John J Koldus, III; Dr. Ray M. Bowen; Dr. Kevin Jackson; Dr. Zack Coapland; Maj. Gen. M.T. Hopgood; Brig. Gen. Don Johnson; Maj. Rebecca Ray; Jim Reynolds; Robert Harry Stiteler, and Michael Krenz. Only Thompson, Bowen and Southerland are named as Defendants in all six suits. The remaining individuals are named as Defendants in *Self* only, or *Self* and *Comstock*. The Court will hereinafter refer to the University and the University Officials together as "Defendants."

[3] The *Self* and *Comstock* Plaintiffs have also asserted state law claims against a number of Defendants who, although intimately involved with the University, were not employed by the University at the time of the Bonfire collapse. The analysis in Part II and Part III of this Order pertains only to the merits of Plaintiffs' claims against the University and the University Officials; and in no way comments upon the validity of any Bonfire-related claim, filed by any Plaintiff, against any non-state actor Defendant.

Motion for Summary Judgment wherein they assert that they are immune from liability with respect to Plaintiffs' federal and state law claims and alternatively, that Plaintiffs have failed to state a viable cause of action upon which relief can be granted.[4] After very carefully and thoughtfully considering Defendants' well-prepared Motion, Plaintiffs' insightful Responses thereto, the lengthy record in this matter and the applicable law, the Court concludes that Defendants' Motion for Summary Judgment must be **GRANTED IN PART** with respect to Plaintiffs' federal law claims. For reasons set forth below, the Court need not reach the merits of Defendants' Motion for Summary Judgment with respect to Plaintiffs' allegations of negligence, as the Court respectfully declines to exercise supplemental jurisdiction over Plaintiffs' state law claims.[5]

I.

The following facts are primarily derived from the Final Report of the Special Commission on the 1999 Texas A&M Bonfire ("Final Report"). At this stage of the proceedings, the Parties have accepted the Final Report – the product of hundreds of hours of investigation and expert analysis – as an authoritative account of the history of Bonfire, the mechanics of the 1999 collapse and the factors

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[4] Defendants' Motion for Summary Judgment incorporates the legal arguments and authorities contained within their Rule 12(b)(6) Motion to Dismiss, filed December 19, 2001.

[5] Several of the Plaintiffs are not asserting state law claims in the instant lawsuits, as they have already filed such claims in various state courts. Part IV of this Order, which pertains to the Court's supplemental jurisdiction, is therefore inapplicable to those Plaintiffs.

that contributed to this far-reaching tragedy. The Court likewise adopts the Final Report as a definitive narrative of the relevant facts for purposes of its instant analysis. However, because the Court wishes to provide as comprehensive of a factual summary as possible, the following account also includes several facts gleaned from the summary judgment evidence.

The much loved and revered Texas A&M Bonfire tradition began humbly, with a burning trash heap in 1909. Over the ensuing ninety years, Bonfire grew into one of the most cherished traditions of Texas A&M University, uniting students, administrators, alumni and the surrounding community each September, October and November. The process of cutting trees into logs, stacking the logs into a towering structure and preparing to ceremoniously burn the edifice on the eve of Texas A&M's annual football game with the University of Texas occupied over five thousand students for an estimated 125,000 hours each fall. At the culmination of these efforts, an estimated forty to eighty thousand individuals gathered annually to watch Bonfire ignite and burn. The University's students, or "Aggies," believe that Bonfire symbolizes their burning desire to "beat the hell out of t.u" at the next day's football game. It is symbolic not only of one school deeply rooted in tradition, but is representative of the entire Nation's passionate fascination with the most venerated aspects of collegiate football.

Bonfire may have started out as a pile of wood and trash, but by 1999, it had evolved into a massive structure with measurable technical complexity. The initial switch from trash to logs took place in the 1940s, when the students introduced a center pole and a teepee-shaped design. Because a teepee-shaped structure can only reach

as high as its tallest log, the students began building Bonfire with multiple layers of logs in the 1960s. The 1968 and 1969 Bonfires utilized this multi-tier design, with the 1969 Bonfire reaching 109 feet – the tallest Bonfire ever recorded. In the late 1970s, Bonfire began to take on a wedding cake-shaped design, with multiple cylindrical layers stacked one on top of the other. Since the 1980s, all Bonfires have been (1) built in the wedding cake design; (2) sixty to eighty feet tall; (3) six tiers bound with wire; (4) built around a two-part spliced center pole; and (5) surrounded by four perimeter poles with guy ropes. A completed 1990s Bonfire likely weighed over two million pounds. No other institution of higher learning in the world lays claim to a blazing bonfire of such monumental proportions, and it is an instantly recognizable source of pride and "fighting spirit" to past, present and future Aggies around the globe.

Even in light of Bonfire's massive proportions, its design and construction always remained almost the exclusive purview of the students. The "Redpots," student leaders between the ages of 19 and 21, controlled the Bonfire build year after year. The Repots were not licensed engineers or architects, lacked formalized construction training and were not required to attend classes on architectural design or building techniques. Moreover, Redpots possessed less than two months experience as "Junior Redpots" before being promoted to Redpots as seniors, failed to utilize blueprints and relied on building techniques that were passed down orally from their student predecessors. Yet Defendants entrusted the Redpots with the primary responsibility for erecting the enormous Bonfire each fall.

Defendants undoubtably recognized the dangers of Bonfire. In fact, one University document noted that "[i]t is a well-established fact that Bonfire constitutes by far the single most liability laden student activity on campus." Other University documents warned that "Bonfire is, by its vary nature, a hazardous activity"; "Bonfire involves thousands of students engaged in a variety of activities, some of which involve potential risks and liability and therefore supervision is paramount"; and "[a]s we, all are aware, Bonfire is a very risky undertaking from a safety and liability perspective." Blaine Lewis, a Junior Redpot, wrote in a 1997 paper that stacking the Bonfire's logs "has the potential for great tragedy at any time." Against this backdrop, the University purchased a two million dollar general liability insurance policy to insure against a catastrophic disaster on campus.

Nevertheless, very few truly significant restrictions were ever imposed, communicated or uniformly enforced to protect the safety of Bonfire participants. However, Defendants did not ignore Bonfire safety altogether. Faculty and staff frequently visited the Bonfire site for observation purposes. Defendants created the faculty post of "Bonfire Advisor," implemented a policy that restricted access to the Bonfire site during construction and intermittently passed other safety measures in response to particular "trigger" events. For instance, Defendants (1) imposed a fifty-five foot height restriction on Bonfire in response to fire hazard complaints; (2) required Bonfire participants to attend tree-cuffing training programs after they received reports of cut-site accidents; (3) appointed an alcohol awareness committee and organized the "Don't Shatter the Tradition" campaign to combat excessive Bonfire-related drinking; and (4) prohibited students from riding in the

back of pick-up trucks after a motor vehicle fatality. The Final Report characterizes this conduct as a "reactive risk management model" and explains that Defendants only implemented very specific remedial measure in response to specific triggers. Apparently, no specific events or incidents triggered Defendants to query whether Bonfire was structurally unsound prior to 1999. Consequently, they never inquired into Bonfire's structural integrity; and therefore neglected to reexamine Bonfire's design prior to the collapse.

It can be reasonably argued that Defendants *should* have undertaken a study of Bonfire's structural soundness in 1994. That year, the partly constructed edifice suffered a partial collapse (or "lean") that should have alerted the State Defendants of Bonfire's instability. However, the 1994 mishap was attributed by those involved to wet and unstable ground, not structural integrity. In fact, those involved praised the structural integrity of the 1994 Bonfire because heavy equipment was needed to pull the stack apart. Consequently, the mishap failed to trigger a design re-examination. According to the Final Report, the "people obviously concerned with Bonfire safety, did in fact misinterpret these events and missed clear warning signs about structural integrity. This tunnel vision in decision [was] due . . . to a cultural bias in which legitimate courses of action outside past experience or contrary to the University's pre-disposition are often not considered. . . . More objective interpretations or more conservative interpretations, which might have led to a structural reassessment, could reasonably have been considered."

Regrettably, because of Defendants' reluctance to depart from or question "the way its always been," no one viewed the 1999 Bonfire as a potentially hazardous

towering structure tenuously held together with wire. More significantly, no one proposed a sweeping reassessment of Bonfire's construction process. And the results were catastrophic and heartbreaking. The 1999 Bonfire collapsed prior to completion, killing twelve students and injuring twenty-seven others, resulting in an enormous groundswell of grief and remorse which continues to reverberate to the deepest recesses of the worldwide Aggie community.

The Final Report characterizes the physical mechanics of the collapse as a "containment failure" in the first tier of logs, primarily caused by (1) excessive internal stresses driven primarily by aggressive wedging of second tier logs into the first tier; and (2) inadequate containment strength caused by insufficient binding support in the wiring used to tie the logs together. Moreover, the first stack of the 1999 Bonfire was not wrapped with steel cables, further reducing containment strength. Steel cables had been wrapped around the first tier as a matter of course for several years prior to 1999. The Final Report also identifies the overarching factors that brought about the physical collapse: the absence of a proactive risk management model; the University community's cultural bias impeding risk identification; the lack of student leadership knowledge and skills pertaining to structural integrity; and the lack of formal, written Bonfire design plans or construction methodology. Together, these factors created an environment wherein students were permitted to construct a complex and dangerous structure without adequate engineering supervision or physical safety controls and led to a complex organizational failure. The Bonfire collapse was not caused by a specific event, error or omission in 1999, but, rather, by decisions and actions

taken by both students and University officials over many, many years.

II.

The Court will initially consider Plaintiffs' § 1983 claims against the University, before turning to Plaintiffs' claims against the University Officials. In their Motion for Summary Judgment, Defendants maintain that the University is entitled to summary judgment in its favor on the basis of Eleventh Amendment immunity. The Court agrees.

The University is a state-funded state institution of higher education. *See* Tex. Educ. Code § 86.02 (signifying that Texas A&M University was created by the laws of the State of Texas). Consequently, Plaintiffs are barred from bringing this suit against the University unless they are able to overcome the State's jurisdictional immunity in federal court, commonly referred to as "Eleventh Amendment" immunity.[6] *See Ouem v. Jordan,* 440 U.S. 332, 341, 99 S. Ct. 1139, 1145, 59 L.Ed.2d. 358 (1979). Eleventh Amendment immunity prohibits actions against a state entity in federal court, unless either the state has waived its sovereign immunity or Congress, pursuant to another provision in the Constitution, has expressly abrogated the state's immunity. *See Will v. Mich. Dept. of State Police,*

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[6] The Court notes that "Eleventh Amendment" immunity is not actually derived from the Eleventh Amendment to the Constitution. *See Alden v. Maine,* 527 U.S. 706, 713, 199 S. Ct. 2240, 2246, 144 L.Ed.2d 636 (1999) (explaining that the phrase "Eleventh Amendment immunity" is "convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment.").

491 U.S. 58, 66, 109 S. Ct. 2304, 2309-10, 105 L.Ed.2d 45 (1989); *Welch v. Tex. Dept. of Highways and Pub. Transp.*, 483 U.S. 468, 473-74, 107 S. Ct. 2941, 2946, 97 L.Ed.2d 389 (1987). A state's intention to waive its sovereign immunity must be "unequivocally expressed." *Stem v. Ahearn*, 908 F.2d 1, 4 (5th Cir. 1990) (citing *Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 305-06, 100 S. Ct. 1868, 1873, 109 L.Ed.2d 264 (1990)). Significantly, Texas has not consented to be sued in federal court by individuals regarding the 1999 Bonfire collapse, nor has state sovereign immunity been abrogated or compromised by Congress with the passage of § 1983. The Supreme Court has held, in fact, that states are not "persons" subject to suit within § 1983's scope. *See Arizonans for Official English v. Ariz.*, 520 U.S. 43, 69, 117 S. Ct. 1055, 1069, 137 L.Ed.2d 170 (1997) (citing *Will*, 491 U.S. at 71, 109 S. Ct. at 2312); *see also Cronen v. Tex. Dept. of Human Servs.*, 977 F.2d 934, 936 (5th Cir. 1992); *Stem*, 908 F.2d at 4. Accordingly, the Court finds that the University is shielded from liability in this matter by its Eleventh Amendment immunity, as a matter of law.[7] Consequently,

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[7] Previous decisions of the Fifth Circuit and District Courts within the Southern District of Texas have consistently afforded Eleventh Amendment immunity to state universities, including Texas A&M. *See, e.g., Tex. ex rel. Ed. of Regents of Univ. of Tex. Sys. v. Walker*, 142 F.3d 813, 820 n. 10 (5th Cir. 1998) (citing *Regents of Univ. of Cal. v. Doe*, 519 U.S. 425, 429-31, 117 S. Ct. 900, 903-04, 137 L.Ed.2d 55 (1997) and *United Carolina Bank v. Bd. of Regents of Stephen F. Austin State Univ.*, 665 F.2d 553, 556-61 (5th Cir. 1981)); *Mangaroo v. Nelson*, 864 F.2d 1202, 1204 (5th Cir. 1989); *Gay Student Servs. v. Tex. A&M Univ.*, 737 F.2d 1317, 1333-334 (5th Cir. 1984); *Lowery v. Univ. of Houston – Clear Lake*, 82 F. Supp.2d 689, 693 (S.D. Tex. 2000); *Chacko v. Tex. A&M Univ.*, 960 F. Supp. 1180, 1197-198 (S.D. Tex. 1997); *Baldwin v, Univ. of Tex. Med. Branch at Galveston*, 954 F. Supp. 1022, 1030 (S.D. Tex. 1996); *Idoux v. Lamar Univ. Sys.*, 817 F. Supp. 637, 639-640 (E.D.

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Defendants' Motion for Summary Judgment is hereby **GRANTED** with respect to Plaintiffs' federal law claims against the University and each and all of those claims are hereby **DISMISSED WITH PREJUDICE.**

III.

Plaintiffs also allege that the University Officials are liable for the harm that befell the Bonfire victims pursuant to § 1983.[8] In response, Defendants contend that Plaintiffs' § 1983 claim – against the University Officials must be dismissed pursuant to Fed. R. Civ. P. 12(b)(6), or, alternatively, on qualified immunity grounds. The Court need not reach the qualified immunity issue, however, because Defendants correctly assert that a Rule 12(b)(6) dismissal is warranted.

Legal Standard for Rule 12(b)(6) Dismissal

The Federal Rules of Civil Procedure authorize a court, upon suitable showing, to dismiss any action or any claim within an action for failure to state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6). Put another way, Rule 12(b)(6) dismissal is appropriate when the "the plaintiff would not be entitled to relief under any set of facts or any possible theory that he could prove consistent with the allegations in his complaint." *Jones v. Grainger,* 188 F.3d 322, 324 (5th Cir. 1999); *see*

Tex. 1993); *Zentgraf v. Tex. A&M Univ.,* 492 F. Supp. 265, 271-72 (S.D. Tex. 1980).

[8] Plaintiffs have sued the University Officials in their individual capacities only.

also Fed. R. Civ. P. 12(b)(6). When making this determination, the Court accepts as true all well-pleaded allegations in the complaint, and views them in a light most favorable to the plaintiff. *See Malina v. Gonzales,* 994 F.2d 1121, 1125 (5th Cir. 1993). A plaintiff must plead specific facts in order to avoid dismissal for failure to state a claim and consequently, the Court will not accept conclusory allegations or unwarranted deductions of fact contained within the plaintiff's complaint as true. *See Tuchman v. DSC Communications Corp.,* 14 F.3d 1061, 1067 (5th Cir. 1994). Unlike a Motion for Summary Judgment, a Motion to Dismiss should be granted only when it appears without a doubt that the plaintiff can prove no set of facts in support of his claims that would entitle him to relief. See *Conley v. Gibson.* 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80 (1957).

In considering a motion to dismiss for failure to state a claim, a district court must limit itself to the contents of the pleadings, including attachments thereto. See Fed. R. Civ. P.12(6)(6). However, "[d]ocuments that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to [the plaintiff's] claims." *Collins v. Morgan Stanley Dean Whitter,* 224 F.3d 496, 498-99 (5th Cir. 2000) (citing *Venture Assoc. Corp. v. Zenith Data Sys. Coro.,* 987 F.2d 429, 431 (7th Cir. 1993)); *see also Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002); *Branch v. Tunnell,* 14 F.3d 449, 453-54 (9th Cir. 1994); *In re Securities Litigation BMC Software, Inc.,* 183 F. Supp. 2d 860, 883 (S.D. Tex. 2001); *Franks v. Prudential Health Care Plan. Inc.*, 164 F. Supp. 2d 865, 872 (S.D. Tex. 2001). By attaching documents that are integral to the plaintiff's claims, "the defendant merely assists the plaintiff in

establishing the basis of the suit, and the court in making the elementary determination of whether a claim has been stated." *Collins,* 224 F.3d at 499. In these cases, the Complaints on file repeatedly refer to the Final Report; and Plaintiffs' allegations are clearly based upon the findings contained therein. Accordingly, in reviewing Plaintiffs' federal claims under Rule 12(b)(6), the Court will equally consider the Plaintiffs' well-pleaded allegations and the facts set out in the Final Report.

42 U.S.C. § 1983

Section 1983 provides a cause of action against "[e]very person who, under color of any statute . . . of any State . . . subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws. . . ." 42 U.S.C. § 1983; *see also Moore v. Willis Indep. Sch. Dist.,* 233 F.3d 871, 874 (5th Cir. 2000) (citing *Leffall v. Dallas Indep. Sch. Dist.*, 28 F.3d 521, 525 (5th Cir. 1994)). "Rather than creating substantive rights, § 1983 simply provides a remedy for the rights that it designates." *Johnston v. Harris County Flood Control Dist.,* 869 F.2d 1565, 1573 (5th Cir. 1989). The assertion of an underlying constitutional or statutory violation is therefore a predicate to liability under § 1983. *See id.* In their attempt to establish federal liability against the University Officials, Plaintiffs premise their § 1983 claims upon an alleged substantive due process violation, arising from the "state created danger" theory.[9]

[9] Defendants initially argue that Plaintiffs' § 1983 claims must be dismissed because the state created danger theory was not well-settled

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State Created Danger Theory

In general, state governments are under no affirmative duty to provide protective services: "[T]he Due Process Clause generally confers no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty or property interests of which the government itself may not deprive the individual . . . [Thus,] a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 196-97, 109 S. Ct. 998, 1003-04, 103 L.Ed.2d 249 (1989); *see also McClendon v. City of Columbia*, 258 F.3d 432, 436 (5th Cir. 2001); *Walton v. Alexander*, 44 F.3d 1297, 1302 (5th Cir. 1995) *(en banc)*. Rather, the Constitution imposes a duty on the state to protect particular individuals only in "certain limited circumstances." *DeShaney*, 489 U.S. at 198, 109 S. Ct. at 1004. The Fifth Circuit has recognized two such limited scenario, namely, when the state has a special relationship

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law in this Circuit at the time of the Bonfire collapse. The Court rejects this argument, however because the Fifth Circuit's recent decision in *McClendon v. City of Columbia*, 258 F.3d 432 (5th Cir. 2001), explains that the state created danger theory was the law in this Circuit well-before 1999. *See id.* at 441 ("We conclude that . . . [on July 12, 1993] it was clearly established that a state actor creating a danger, knowing of that danger, and using his authority to create an opportunity for a third person to commit a crime that otherwise might not have existed, was subject to liability for a violation of the victim's rights."). The fact that the Fifth Circuit recently agreed to rehear *McClendon en banc* does not change the Court's conclusion. *McClendon* is the best authority currently available on this issue and the Court sees no reason to depart from its reasoning. On the assumption that this ruling will be appealed, the Parties are of course free to seek reassessment of the present state of the law. But any modification thereof is a policy consideration best left to the Fifth Circuit.

with the person or when the state exposes a person to a danger of its own creation, or a "state created danger." *See McClendon,* 258 F.3d at 436. Plaintiffs do not argue that the University Officials had a special relationship with the Bonfire victims, rather, they allege that the University Officials violated the Due Process Clause by failing to protect the victims from a state created danger.

The Fifth Circuit set out the two basic requirements of the state created danger theory in *Piotrowski v. City of Houston,* 51 F.3d 512 (5th Cir. 1995). A plaintiff asserting such a claim must show the (1) the state actors increased the danger to him or her; and (2) the state actors acted with deliberate indifference. *See id.* at 515; *see also McClendon,* 258 F.3d at 437; *Doe v. Hillsboro Indep. Sch. Dist.,* 113 F.3d 1412, 1415 (5th Cir. 1997); *Johnson v. Dallas Indep. Sch. Dist.,* 38 F.3d 198, 201 (5th Cir. 1994). Plaintiffs allege that the University Officials created a danger by failing to ensure the Bonfire's structural integrity. The facts surrounding the Bonfire collapse clearly tend to suggest that the conduct of the University Officials may have contributed, at least in part, to the 1999 Bonfire collapse. But *even* if the University Officials created an environment that was dangerous to the Bonfire victims (and the Court is expressly not now so finding), it is quite clear that they did not do so with "deliberate indifference" – the requisite culpability to make out a constitutional violation.[10]

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[10] Furthermore, *even* if the University Officials did create an environment that was dangerous to the Bonfire victims, that fact appears to be insufficient to satisfy the first requirement for the state created danger theory. The Final Report concluded that the students who were building the 1999 Bonfire (a group which includes the

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Deliberate Indifference

There is a significant distinction between a tort and a *constitutional* wrong. *Leffall,* 28 F.3d at 532 (citing *de Jesus Benavides v. Santos,* 883 F.2d 385, 388 (5th Cir. 1989)). The Supreme Court has made it clear that "[t]he Due Process Clause of the Fourteenth Amendment is not implicated by the lack of due care of an official causing unintended injury to life, liberty or property." *Davidson v. Canon,* 474 U.S. 344, 347, 106 S. Ct. 668, 670, 88 L.Ed.2d 677 (1986). Rather, reckless or grossly negligent conduct by state officials falls squarely within the ambit of traditional state tort law. *See de Jesus Benavides,* 883 F.2d at 388. Simply put, where a government official is merely negligent in causing the injury, no procedure for compensation is *constitutionally* required. *See Davidson*, 474 U.S. at 347, 106 S. Ct. at 670. Accordingly, the conduct of a state actor fails to violate a victim's right to substantive due process unless that conduct is carried out with deliberate indifference.

The Fifth Circuit defines "deliberate indifference" as "'a lesser form of intent' rather than a 'heightened form of negligence." *Leffall*, 28 F.3d at 531; *Doe v. Taylor Indep. Sch. Dist.,* 15 F.3d 443, 453 n13 (5th Cir. 1994) (explaining that deliberate indifference involves a higher degree of

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students who were killed and/or harmed) also played a role in the harm that befell them. None of the Fifth Circuit cases recognizing the state created danger doctrine have involved an incident for which the victims were partially at fault. Rather, the relevant cases have only recognized state created dangers where state actors created situations that increased the risk of danger from *third parties* to specific individuals. *See, e.g. McClendon,* 258 F.3d at 432; *Piotrowski v. City of Houston,* 51 F.3d at 512; *Johnson,* 38 F.3d at 198. On this basis alone, the state created danger theory is legally inapplicable here.

certainty than gross negligence). To establish deliberate indifference, "the environment created by the state actors must be dangerous; they must know it is dangerous; and . . . they must have used their authority to create an opportunity that would not otherwise have existed for the . . . crime to occur." *Johnson,* 38 F.3d at 201. Deliberate indifference can arise from "tortious conduct exceeding mere negligence but not quite rising to the level of intentional, e.g. deliberate (or conscious) indifference, recklessness or gross negligence." *Salas v. Carpenter,* 980 F.2d 299, 307 (5th Cir. 1992). Essentially, "[t]he key to the state created danger cases . . . lies in the state actors' culpable knowledge and conduct in affirmatively placing an individual in a position of danger, effectively stripping a person of [his or] her ability to defend [himself or] herself, or cutting off potential sources of private aid." *Johnson,* 38 F.3d at 201 (quotations and citations omitted).

In *Johnson,* the Fifth Circuit noted that *Wood v. Ostrander,* 879 F.2d 583 (9th Cir. 1989), exemplifies the state created danger theory of liability. In that case, a police officer arrested a drunken driver and impounded his car, leaving the driver's female passenger alone at night, without any means of getting home, in an area notorious for criminal activity. She was subsequently raped by a stranger who offered her a ride. *See id.* at 586. Other cases applying the state created danger theory are to a similar effect. *See, e.g. Dwares v. City of New York,* 985 F.2d 94, 99 (2d Cir. 1993) (holding that it would violate due process for police officers to conspire with and sanction violence by "'skinheads" against persons burning American flags); *L.W. v. Grubbs,* 974 F.2d 119, 121-22 (9th Cir. 1992) (holding that § 1983 plaintiff had stated a claim by alleging that she was a nurse employed by the state, that her

supervisors had instructed her to work alone with a known sex offender after leading her to believe that she would not be made to work under such conditions and that she had been assaulted by the sex offender while alone with him); *Freeman v. Ferguson,* 911 F.2d 52 (8th Cir. 1980) (finding a viable § 1983 claim where a woman was killed by her estranged husband after the chief of police had directed his officers to ignore her pleas that they stop the husband, who was the police chief's friend, from threatening and intimidating her); *White v. Rochford,* 592 F.2d 381, 382-83 (7th Cir. 1979) (finding that two small children stated a § 1983 claim by alleging that police officers arrested their uncle and left them unattended in a car on the side of the freeway). In light of these authorities, the Court emphasizes that deliberate indifference arises in cases involving conduct that is substantially more abhorrent, and significantly more detestable, than even gross negligence.

The conduct of the University Officials does not rise to such a level, as a matter of law. As demonstrated by the Final Report, there is *no* evidence that the University Officials were aware of the impending Bonfire collapse. To the contrary, the Final Report concluded that "[n]o one in the [University's] administration ever interpreted ongoing behavioral problems as indications that safe Bonfire design and construction was beyond the capabilities of student leaders." Nor do the facts suggest that the University Officials directly prevented increased Bonfire safety or opposed a review of Bonfire's structural integrity. They simply failed to recognize that change was desperately needed. They built Bonfire the way that it had always been built and the way that it had always succeeded. For them, Bonfire was, and is, an institution. And, as stated in

the Final Report, "leaders do not change institutions unless there is a clearly perceived need to do so."

The record presently before the Court amply demonstrates that the University Officials were aware of the dangers posed by Bonfire. Consequently, it can be persuasively argued that they may have acted negligently, possibly even grossly so, and that the Bonfire collapse could have been prevented had cautionary measures been implemented. However, despite their knowledge of Bonfire's extremely risky nature and their failure to proactively avert or reduce those risks, the evidence equally shows that the University Officials were unaware of the *precise* risk at hand – the risk that the entire Bonfire would come tumbling down. Rather, the University Officials believed that ninety years of successful Bonfire building experience was enough in itself to ensure that the tradition would safely continue. Although the University Officials' lack of awareness might appear naive, and possibly even foolish, in retrospect, it cannot support a finding of deliberate indifference. This is not a case in which state actors "brought the victim into close proximity with a specific individual known to be likely to commit violence, . . . or abandoned the victim in a highly dangerous environment, . . . or conspired with [a] private actor who inflicted the deprivation." *Leffall,* 28 F.3d at 531. Plaintiffs concede that the University Officials took *some* measures to ensue Bonfire safety (i.e. height restriction, appointment of a Bonfire advisor, tree-cutting training program, alcohol awareness committee, prohibition against riding in the back of pick-up trucks). Simply put, because the University Officials were indeed concerned with Bonfire Safety (albeit, in hindsight, not concerned enough, or in precisely the right way), the Court cannot

conclude that their conduct rose to the egregious level of a constitutional violation, as a matter of law.[11] *See id.* at 531-32 (concluding that even if school officials' decision to sponsor dance at high school, despite awareness of dangers posed thereby, was negligent, such conduct did not rise to the level of deliberate indifference to the rights of a student who was killed by random gunfire in the school parking lot after the dance); *Doe,* 15 F.3d at 456 n. 12 (observing that "good faith but ineffective responses" by state actors tend to defeat claims of deliberate indifference). In reaching this conclusion, the Court in no way condones the reactive risk management policy of the University Officials or their cultural bias against departing from tradition in favor of newer safer measures. Rather, the Court recognizes the distinction between state law torts and constitutional wrongs. Expanding the substantive due process clause to encompass the allegations at issue here would violate well-settled principles of constitutional law and expand the protections of the Fourteenth Amendment beyond their appointed boundaries. Therefore, because Plaintiffs fail to allege, and cannot allege, a cognizable substantive due process violation, as a matter of law, Plaintiffs' § 1983 claims against the University Officials warrant dismissal pursuant to Fed. R. Civ. P. 12(b)(6). Defendants' Motion for Summary Judgment is therefore GRANTED with respect to Plaintiffs' federal law

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[11] The Court acknowledges that the existence of deliberate indifference is often a factual determination. However, because the Final Report affirmatively discloses that the University Officials in this case lacked the requisite culpability with respect to the alleged violation of the Bonfire victims' constitutional rights, it is not only appropriate, but mandatory in this instance to conclude that the University Officials failed to act with deliberate indifference, as a matter of law.

claims against the University Officials and each and all of such claims are hereby **DISMISSED WITH PREJUDICE.**

IV.

Having dismissed all of Plaintiffs' federal law claims, the Court is now faced with six negligence lawsuits governed purely by state tort law. Thus, the Court must decide whether to retain supplemental jurisdiction over Plaintiffs' remaining claims. In evaluating this matter, the Court is guided by the supplemental jurisdiction statute, 28 U.S.C. § 1367. Section (a) of that statute provides that "in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to the claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). Section (c) of the statute refines the supplemental jurisdiction doctrine by enumerating four circumstances in which District Courts have discretion to decline supplemental jurisdiction over state law claims: (1) when the state law claims raise novel or complex issues of state law; (2) when the state law claims substantially predominate over the claims within the district court's original jurisdiction; (3) when the district court dismisses the claims over which it has original jurisdiction; and (4) in exceptional circumstances, if there are other compelling reasons for declining jurisdiction. 28 U.S.C. § 1367(c). In this case, the third factor enumerated in § 1367(c) is clearly present, and to only a slightly lesser extent, the second and fourth factors as well. The Court has dismissed all of the claims that were within the Court's original

jurisdiction and only Plaintiffs' state law claims remain. And those claims are manifestly better suited for resolution by a state court, applying squarely applicable state law, in front of a jury of state citizens. Accordingly, the Court respectfully declines to exercise its supplemental jurisdiction over Plaintiffs' state law claims. *See Noble v. White,* 996 F.2d 385, 395 (5th Cir. 1993) ("District courts enjoy wide discretion in determining whether to retain supplemental jurisdiction over a state law claim once all federal claims are dismissed"); *Rhyne v. Henderson,* 973 F.2d 386, 395 (5th Cir. 1992) ("The district court has properly dismissed all of the federal questions that gave it original jurisdiction in this case. Therefore, we find that the district court's dismissal of the state law claims was proper under 28 U.S.C. § 1367(c)"); *see also United Mine Workers of Am. v. Gibbs,* 383 U.S. 715, 726, 86 S. Ct. 1130, 1139, 16 L.Ed.2d 218 (1966) ("Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of the applicable law."). As such, Plaintiffs' state law claims are hereby **DISMISSED WITHOUT PREJUDICE**. Plaintiffs are free to refile their state law claims against Defendants in state court, if they so desire, either by filing new actions or by seeking leave to intervene in the state cases that are already well underway. In doing so, Plaintiffs are of course subject to the applicable limitations requirements.[12] All Parties are to bear their own taxable costs, expenses and attorneys'

[12] For the same reasons, the Court also declines to exercise supplemental jurisdiction over the *Self* and *Comstock* Plaintiffs' state law claims against the non-state actor Defendants. Thus, those claims are likewise **DISMISSED WITHOUT PREJUDICE**, rather to proceed in either new or extant state court litigation, as appropriate.

fees incurred herein to date; and all other pending Motions, filed by any of the Parties to this litigation, are hereby **DENIED** as moot.

IT IS SO ORDERED.

DONE this 23rd day of July, 2002, at Galveston, Texas.

/s/ Samuel B. Kent
SAMUEL B. KENT
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

SEAN BREEN, et al. Plaintiffs, v. J. MALON SOUTHERLAND, et al. Defendants.	§ § § § § § § §	CIVIL ACTION NO. G-01-670

FINAL JUDGMENT

(Entered May 24, 2004)

Pursuant to the Court's Order, all claims brought by Plaintiff against Defendants are hereby **DISMISSED WITH PREJUDICE**. All relief not herein provided is expressly **DENIED**. All Parties are **ORDERED** to bear their own costs and attorneys' fees incurred herein to date. **THIS IS A FINAL JUDGMENT.**

IT IS SO ORDERED.

DONE this 21st day of May, 2004, at Galveston, Texas.

/s/ Samuel B. Kent
SAMUEL B. KENT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS GALVESTON DIVISION

SEAN BREEN, et al.	§	
Plaintiffs,	§	
J. MALON SOUTHERLAND, et al.	§	CIVIL ACTION NO. G-01-670
Defendants.	§	

ORDER GRANTING DEFENDANTS' RENEWED MOTION FOR SUMMARY JUDGMENT

(Entered May 24, 2004)

This lawsuit arises out of the tragic collapse of the Texas A&M Bonfire ("Bonfire") in the early hours of November 18, 1999, which killed twelve students and injured an additional twenty-seven. Now before the Court comes the Defendants' Renewed Motion for Summary Judgment. Because Defendants are entitled to qualified immunity from suit, the Motion is hereby **GRANTED**.

I. Background

The facts of this case have previously been laid out by this Court and the Fifth Circuit, and the Court will not repeat them in this Order. This action is one of six virtually identical lawsuits[1] now pending before the Court.

[1] The Court is issuing this Order in all six lawsuits, which are styled as *Breen v. Tex. A&M Univ., et al.*, No. G-01-CV-270 (S.D. Tex. filed Oct. 24, 2001); *Comstock v. Tex. A&M Univ., et al.*, No. G-01-CV-730 (S.D. Tex. filed Nov. 19, 2001); *Davis v. Tex. A&M Univ. et al.*, No. G-01-CV-720 (S.D. Tex. filed Nov. 16, 2001); *Kimmel v. Tex A&M Univ., et al.*, No. G-01-CV-719 (S.D. Tex. filed Nov. 16, 2001); *Scanlan v. Tex.*

(Continued on following page)

Plaintiffs allege that various former and present high-level employees of Texas A&M University[2] ("University Officials" or "Defendants") deprived the Bonfire victims of their Fourteenth Amendment right to substantive due process by acting with deliberate indifference to the state-created danger that killed or injured them. Plaintiffs further alleged violations of Texas law. In an Order dated July 23, 2002, the Court dismissed all of Plaintiffs' federal claims pursuant to Fed. R. Civ. P. 12(b)(6). The Court declined to exercise supplemental jurisdiction over Plaintiffs' state-law claims, and the dismissal of those claims without prejudice was not appealed. Plaintiffs' claims

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A&M Univ., et al., No. G-01-CV-733 (S.D. Tex. filed Nov. 19, 2001); and *Self et al. v. Tex. A&M Univ., et al.*, No. G-01-CV-721 (S.D. Tex. filed Nov 16, 2001). The Plaintiffs are, in *Breen*, the brother/administrator and parents of Christopher Breen, a former student killed in the collapse; in *Comstock*, John Andrew Comstock, the most severely injured surviving victim of the collapse, and his mother; in *Davis*, Bill Davis, one of the students injured in the collapse; in *Kimmel*, the estate and parents of Lucas Kimmel, one of the students killed in the collapse; in *Scanlan*, Lauren Scanlan, one of the students injured in the collapse, and her parents; and in *Self* the mother/administrator of Jerry Don Self (student killed), the mother/administrator and father of Bryan McClain (student killed), the father/administrator and mother of Christopher Lee Heard (student killed), the father/administrator and mother of Chad Powell (student killed), Matthew Robbins (student injured), Dominic Braus (student injured) and his mother. In all, these six suits represent eleven (six killed, five injured) of the thirty-nine total victims of the Bonfire collapse.

[2] The University Officials include: Russell Thompson; Dr. J. Malon Southerland; Dr. William Kibler; Dr. John J. Koldus, III; Dr. Ray M. Bowen; Dr. Kevin Jackson; Dr. Zack Coapland; Maj. Gen. M.T. Hopgood; Brig. Gen. Don Johnson; Maj. Rebecca Ray; Jim Reynolds; Robert Harry Stiteler, and Michael Krenz. Only Thompson, Bowen, and Southerland are named as Defendants in all six suits. The remaining individuals are named as Defendants in *Self* only, or *Self* and *Comstock*. The Court will hereinafter refer to the University Officials as "Defendants".

against the University were dismissed on Eleventh Amendment immunity grounds, and no Plaintiff appealed that ruling. Plaintiffs' claims against the University Officials were dismissed after a determination that their actions did not rise to the level of deliberate indifference as a matter of law. It is that ruling that was appealed to the Fifth Circuit Court of Appeals. On August 19, 2003, the Fifth Circuit reversed this Court's findings as to the University Officials and remanded the case for further consideration consistent with its instructions. *See Scanlan v. Tex. A&M Univ.*, 343 F.3d 533 (5th Cir. 2003). The Court of Appeals found that this Court impermissibly relied upon the Final Report of the Special Commissioners on the 1999 Texas A&M Bonfire ("the Final Report"). *See id.* at 538. The Circuit found that without consideration of the Final Report, and construing allegations in a light most favorable to Plaintiffs, the University Officials were not entitled to a dismissal of the claims against them. *See id.* Upon remand, Plaintiffs renewed their Motions for Summary Judgment, which were originally filed in May of 2002. After additional briefing by both sides, those Motions are now ripe for consideration.

II. Summary Judgment Standard

Summary judgment is appropriate if no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Garrett,* 477 U.S. 317, 323, 106 S. Ct. 2548, 2552-53, 91 L. Ed. 2d 265 (1986). When one party moves for summary judgment, the nonmoving party must set forth specific facts showing that there is a genuine issue for trial. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202

(1986). Issues of material fact are "genuine" only if they require resolution by a trier of fact. *See id.* at 248, 106 S. Ct. 2510. The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; rather, only disputes over facts that might affect the outcome of the lawsuit under governing law will preclude the entry of summary judgment. *See id.* at 247-48, 106 S. Ct. 2510. Nevertheless, if the evidence is such that a reasonable fact-finder could find in favor of the nonmoving party, summary judgment should not be granted. *See id.*; *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986). Determining credibility, weighing evidence, and drawing reasonable inferences are left to the trier of fact. *See Anderson,* 477 U.S. at 255, 106 S. Ct. 2513.

III. Qualified Immunity Standard

The University Officials assert that they are entitled to qualified immunity against suit, and the claims against them should be dismissed. "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). "When a defendant invokes qualified immunity, the burden is on the plaintiff to demonstrate the inapplicability of the defense." *McClendon v. City of Columbia,* 305 F.3d 314, 323 (5th Cir. 2002). The University Officials' right to qualified immunity should be determined through the application of a two-prong test. *See Saucier v. Katz,* 533 U.S. 194, 200, 121

S. Ct. 2151, 2155, 150 L. Ed. 2d 272 (2001); *Mace v. City of Palestine,* 333 F.3d 621, 623 (5th Cir. 2003). The first question is whether the facts alleged, considered in a light most favorable to Plaintiffs, show that the University Officials' conduct violated a constitutional right. *Mace,* 333 F.3d at 623. If so, the Court must determine whether that right was clearly established at the time it was violated. That is, would it have been clear to a reasonable person that the Officials' conduct was unlawful under the circumstances? *Id.* at 624. Though it is necessary to consider the prongs in the order presented, the Court may find it necessary to lay out the factors that will aid it in determining whether the right was clearly established in the course of determining whether a constitutional violation actually exists. *See Saucier,* 533 U.S. at 201, 121 S. Ct. 2156.

A. Did the University Officials Violate Plaintiffs' Constitutional Rights?

Determining whether the University Officials violated Plaintiffs' constitutional rights requires two separate analyses: (1) is the right Plaintiffs claim a **constitutional** one; and (2) was that right actually violated? The Court first considers the nature of the right that Plaintiffs are claiming and then examines whether the facts as presented in the Summary Judgment evidence show a violation.

1. Do Plaintiffs claim a constitutional right?

Plaintiffs assert claims under 42 U.S.C. § 1983, which provides a cause of action against "[e]very person who,

under color of any statute . . . of any State . . . subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and the laws . . . " 42 U.S.C. §1983. "Rather than creating substantive rights, § 1983 simply provides a remedy for the rights that it designates." *Johnston v. Harris County Food Control Dist.,* 869 F.2d 1565, 1573 (5th Cir. 1989). The assertion of an underlying constitutional or statutory violation is therefore a predicate to liability under § 1983. *See id.* In their attempt to establish federal liability against the University Officials, Plaintiffs premise their § 1983 claims upon an alleged substantive due process violation arising from the "state-created danger" theory.

In general, state governments are under no affirmative duty to provide protective services: "[T]he Due Process Clause generally confers no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty or property interests of which the government itself may not deprive the individual" *DeShaney v. Winnebago County Dep't of Social Servs.,* 489 U.S. 196-97, 109 S. Ct. 998, 1003-04, 103 L. Ed. 2d 249 (1989). "[A] State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *Id.* at 197, 109 S. Ct. 1004; *see also Walton v. Alexander,* 44 F.3d 1297, 1302 (5th Cir. 1995) (en banc). The Constitution imposes a duty on the state to protect particular individuals only in "certain limited circumstances" *DeShaney,* 489 U.S. at 198, 109 S. Ct. 1004. Courts have recognized two such limited scenarios: (1) when the state has a special relationship with the person; or (2) when the state exposes a person to a danger of its own creation – a "state-created danger." *See*

Piotrowski v. City of Houston, 51 F.3d 512, 516 (5th Cir. 1995) (*"Piotrowski I"*) (citing *Salas v. Carpenter,* 980 F.2d 299, 307 (5th Cir. 1992)). Plaintiffs do not argue that the University Officials had a special relationship with the Bonfire victims; rather, they allege that by failing to ensure Bonfire's structural integrity, the University Officials violated the Due Process Clause by failing to protect the victims from a state-created danger.

The validity of the state-created danger theory is uncertain in the Fifth Circuit. Most recently, the Court of Appeals has noted: "We have never recognized state-created danger as a trigger of State, affirmative duties under the Due Process Clause. We again decline to do [so]." *Rivera v. Houston Indep. Sch. Dist.,* 349 F.3d 244, 249 (5th Cir. 2003). However, the Fifth Circuit has on numerous occasions recognized and discussed the existence and elements of the doctrine as well as its acceptance in other Circuits. *See Randolph v. Cervantes,* 130 F.3d 727 (5th Cir. 1997); *Doe v. Hillsboro Indep. Sch. Dist.,* 113 F.3d 1412 (5th Cir. 1997); *Piotrowski I,* 51 F.3d 512; *Johnson v. Dallas Indep. Sch. Dist.,* 38 F.3d 198 (5th Cir. 1994); *Lefall v. Dallas Indep. Sch. Dist.,* 28 F.3d 521 (5th Cir. 1994); *Salas,* 980 F.2d at 307. In fact, in *Scanlan,* the Fifth Circuit expressly noted that "the district court should have concluded that the plaintiffs stated a section 1983 claim under the state-created danger theory." *Scanlan,* 343 F.3d at 538. In accordance with the Fifth Circuit's instructions in this case, the Court will consider Plaintiffs' claims of a state-created danger as if the theory is valid one. Accordingly, for purposes of further analysis, the Court will proceed under the conclusion that the violations Plaintiffs claim are indeed constitutional ones.

2. Were Plaintiffs' rights violated?

The Fifth Circuit has laid out the requirements a Plaintiff must meet in order to qualify for relief under the state-created danger theory. *See Piotrowski I*, 51 F.3d at 515. "First, a plaintiff must show that the state actors increased the danger to her. Second, a plaintiff must show that the state actors acted with deliberate indifference." *See id.*; *Doe,* 113 F.3d at 1415; *Johnson,* 38 F.3d at 201. Plaintiffs ultimately allege that the University Officials increased the danger to the victims by affirmatively delegating technical and complex Bonfire responsibilities to unqualified students without adequate supervision or guidelines. Defendants maintain that they "passively continued the status quo" and merely permitted students to do what they wanted. The resolution of these polar viewpoints requires examination of literally hundreds of facts. It would be inappropriate and virtually impossible for the Court to decide as a matter of law and based on the record now before the Court whether the state actors increased the danger to the Bonfire victims. Defendants are not entitled to summary judgment based on qualified immunity on the grounds that they did not increase the danger to the victims.

The Court's next analysis considers whether Defendants acted with deliberate indifference. There is a significant distinction between a tort and a *constitutional* wrong. *See Lefall,* 28 F.3d at 532 (citing *de Jesus Benavides v. Santos,* 883 F.2d 385, 388 (5th Cir. 1989)). The Supreme Court has made it clear that "[t]he Due Process Clause of the Fourteenth Amendment is not implicated by the lack of due care of an official causing unintended injury to life, liberty or property." *Davidson v. Canon,* 474 U.S. 344, 347, 106 S. Ct. 668, 670, 88 L. Ed. 2d 677 (1986). Where a

government official is merely negligent in causing the injury, no procedure for compensation is *constitutionally* required. *See id.* at 347, 106 S. Ct. 670. Even reckless or grossly negligent conduct by state officials falls squarely within the ambit of traditional state tort law. *See de Jesus Benavides,* 883 F.2d at 388. Accordingly, the conduct of a state actor does not violate a victim's right to substantive due process unless that conduct is carried out with deliberate indifference.

The Fifth Circuit defines "deliberate indifference" as "'a lesser form of intent' rather than a 'heightened form of negligence.'" *Lefall,* 28 F.3d at 531; *Doe v. Taylor Indep. Sch. Dist.,* 15 F.3d 443, 453 n.13 (5th Cir. 1994) (explaining that deliberate indifference involves a higher degree of certainty than gross negligence). To establish deliberate indifference, "the environment created by the state actors must be dangerous; they must know it is dangerous; and . . . they must have used their authority to create an opportunity that would not otherwise have existed for the . . . crime to occur." *Johnson,* 38 F.3d at 201. Deliberate indifference can arise from "tortious conduct exceeding mere negligence but not quite rising to the level of intentional, e.g. deliberate (or conscious) indifference, recklessness or gross negligence." *Salas,* 980 F.2d at 307. Essentially, "[t]he key to the state created danger cases . . . lies in the state actors' culpable knowledge and conduct in affirmatively placing an individual in a position of danger, effectively stripping a person of [his or] her ability to defend [himself or] herself, or cutting off potential sources of private aid." *Johnson,* 38 F.3d at 201 (quotations and citations omitted).

In this case, Plaintiffs argue that Defendants deliberately ignored the possible dangers of Bonfire in an effort to

avoid future liability. Defendants allege that they never knew or could have known that the Bonfire might collapse and therefore cannot be held liable under a deliberate indifference standard. In its Opinion in this case, the Fifth Circuit stated: "Whether deliberately, delegating the construction of the bonfire stack to students the University Officials allegedly knew were not qualified to handle such a dangerous project, and whether deliberately providing no supervision to students building the bonfire even though they knew the students were not qualified to build the stack, constituted deliberate indifference presents fundamental questions of material fact" *Scanlan,* 343 F.3d at 539. Though this statement was made in an Opinion disposing of Defendants' Motion to Dismiss, the summary judgment evidence submitted since then has only muddied the waters further. At this stage in the proceedings, there remain multiple questions of fact as to whether Defendants acted with deliberate indifference. The existence of these questions prevents the Court from deciding whether Defendants did or did not act with deliberate indifference as a matter of law.

B. Was Defendants' Conduct Objectively Reasonable in Light of Clearly Established Law?

Notwithstanding the Court's conclusion that there exists a genuine issue of material fact concerning Defendants' violation of Plaintiffs' due process-based right to be free from state-created danger, Defendants are entitled to qualified immunity if their conduct was "objectively reasonable in light of the legal rules that were clearly established at the time of [their] actions." *McClendon,* 305 F.3d at 323. As noted above, the Circuit has recognized an individual's substantive due process right to be free from

state-created danger. *See Scanlan,* 343 F.3d at 538 (holding that this Court "should have concluded that the plaintiffs stated a section 1983 claim under the state-created danger theory"). By holding that Plaintiffs stated a claim upon which relief could be granted, the Circuit necessarily recognized as valid the theory of relief behind Plaintiffs' claims.[3]

Under qualified immunity analysis, the Court must determine whether the right to be free from state-created danger was clearly established under the Due Process Clause at the time of the events and activities in question. The Fifth Circuit first considered a state-created danger claim in *Salas v. Carpenter,* 980 F.2d 299 (5th Cir. 1992), a case involving a court clerk who was taken hostage and eventually killed by her estranged husband in the Tarrant County courthouse. The plaintiffs claimed that the Sheriff deprived the victim of her life by preventing the Police Department's SWAT and hostage negotiation teams from securing her release and by using incompetent hostage negotiators. *Id.* at 303. The Fifth Circuit held that the sheriff had not violated a constitutional right as a matter of law because, unlike the state officials in other state-created danger cases, the sheriff did not "worsen [the

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[3] In the Court's understanding of Fifth Circuit due process jurisprudence, *Scanlan* charts a new course by affirmatively recognizing the state-created danger theory for the first time. In a later decision, however, the Fifth Circuit expressly disavowed *Scanlan*'s apparent recognition of the state-created danger theory. *See Rivera,* 349 F.3d at 249 n.5 ("Despite remanding that case to the district court for further proceedings, we did not recognize the state-created danger theory."). Because the second prong of the qualified immunity inquiry focuses on the state of the law at the time of the activities underlying this lawsuit, however, this development does not materially affect Plaintiffs' claims.

victim's] position and abandon her to allow events to run their course." *Id.* at 309. In *McClendon,* decided ten years after *Salas,* the en banc Fifth Circuit stated that *Salas* "did not address the viability of the state-created danger theory"; therefore, *Salas* "would not have provided a reasonable officer with 'fair warning' that creating or increasing a danger to a known victim with deliberate indifference towards that victim violates the victim's substantive due process rights." *McClendon,* 305 F.3d at 330. In other words, the Fifth Circuit's discussion of the state-created danger theory in *Salas* did not clearly establish the right to be free from state-created danger.

The Fifth Circuit recognized in *McClendon* that many circuits have read *DeShaney* to mean that the Due Process Clause imposes an affirmative duty upon state officials to protect an individual from third-party violence "if the state actor played an affirmative role in creating or exacerbating a dangerous situation that led to the individual's injury." *McClendon,* 305 F.3d at 324. The Circuit specifically noted, however, that it had not recognized the state-created danger theory. *See id.* at 325 ("[W]e have not yet determined whether a state official has a similar duty to protect individuals from state-created dangers.") (citing *Piotrowski v. City of Houston,* 237 F.3d 567, 584 (5th Cir. 2001) ("*Piotrowski II*"); *Randolph,* 130 F.3d at 731). In the *McClendon* court's assessment, the Fifth Circuit's reluctance to endorse the state-created danger theory in the period since *Salas* suggested that "a reasonable officer in this Circuit would, even today, be unclear as to whether there is a right to be free from 'state-created danger.'" *Id.* at 332 n.12; *cf. Rivera,* 349 F.3d at 249 ("We have never recognized state-created danger as a trigger of State affirmative duties under the Due Process clause. We again

decline to do [so].") (citation and footnote omitted). *McClendon* highlights the significance of the Fifth Circuit's treatment of this question. The Circuit has not merely declined to recognize the state-created danger theory of substantive due process; it has scrupulously avoided it for more than ten years. The Fifth Circuit's reluctance to adopt the state-created danger theory is therefore not a mere neutral factor to be considered against the general consensus among other circuits, but a warning that the Fifth Circuit might not join that consensus.[4]

The Court therefore concludes that the state-created danger theory of substantive due process was not clearly established at the time of Defendants' Bonfire-related activities. Because Plaintiffs' theory had not been adopted as a viable avenue to a substantive due process claim, a reasonable school official would not have been aware that the Fourteenth Amendment's Due Process Clause provided a constitutional right to be free from state-created danger, much less that an injury caused by a school administrator's failure to exercise control over an activity such as Bonfire would violate that right. Accordingly, Defendants are entitled to qualified immunity from Plaintiffs' § 1983 claims.

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[4] As the *McClendon* Court put it, "a strong consensus of authorities in other circuits is more likely to be determinative on a subject when this circuit is *tabula rasa* on that subject than when the landscape in this circuit is littered with opinions expressing varying levels of skepticism." *McClendon*, 305 F.3d at 332 n.12.

IV. Conclusion

For the reasons articulated above, Defendants' Renewed Motion for Summary Judgment is hereby **GRANTED**. All claims against the University Officials are **DISMISSED WITH PREJUDICE**. All Parties are to bear their own taxable costs, expenses, and attorneys' fees incurred herein to date. A Final Judgment will be issued concurrently with this Order.

IT IS SO ORDERED.

DONE this 21st day of May, 2004, at Galveston, Texas

/s/ Samuel B. Kent
SAMUEL B. KENT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

SEAN BREEN, as administrator of the estate of Christopher Breen, JOHN E. BREEN and MARIAN K. BREEN, Plaintiffs,	§	CIVIL ACTION NO. G-01-670
v.	§	
TEXAS A&M University *et al.* Defendants.	§	

FINAL JUDGMENT

(Entered Jul. 23, 2002)

Pursuant to the Court's Order Dismissing Plaintiffs' Federal Law Claims with Prejudice and Dismissing Plaintiffs' State Law Claims without Prejudice, each and all federal law claims brought by Plaintiffs against Texas A&M University and the individuals employed by the University are hereby **DISMISSED WITH PREJUDICE**. Pursuant to that same Order, each and all state law claims brought by Plaintiffs against the individuals employed by the University are hereby **DISMISSED WITHOUT PREJUDICE**. All relief not herein provided is expressly **DENIED**. All Parties are **ORDERED** to bear their own costs and attorney's fees incurred herein to date. **THIS IS A FINAL JUDGMENT.**

IT IS SO ORDERED.

DONE this 23rd day of July, 2002, at Galveston, Texas

/s/ Samuel B. Kent
SAMUEL B. KENT
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

SEAN BREEN, as	§	
administrator of the estate	§	
of Christopher Breen,	§	
JOHN E. BREEN and	§	
MARIAN K. BREEN,	§	CIVIL ACTION
Plaintiffs,	§	NO. G-01-670
	§	
v.	§	
	§	
TEXAS A&M University *et al.*	§	
Defendants.	§	

ORDER DISMISSING PLAINTIFFS' FEDERAL LAW CLAIMS WITH PREJUDICE AND DISMISSING PLAINTIFFS' STATE LAW CLAIMS WITHOUT PREJUDICE

(Entered Jul. 23, 2002)

The Texas A&M Bonfire ("Bonfire") tragically collapsed in the early hours of November 18, 1999, killing twelve students and injuring an additional twenty-seven. This action is one of six virtually identical lawsuits[1] now

[1] The Court is issuing this Order in all six lawsuits, which are styled as *Breen v. Tex. A&M Univ., et al.*, No. G-01-CV-670 (S.D. Tex. filed Oct. 24, 2001); *Comstock v. Tex. A&M Univ., et al.*, No. G-01-CV-730 (S.D. Tex. filed Nov. 19, 2001); *Davis v. Tex. A&M Univ., et al.*, No. G-01-CV-720 (S.D. Tex. filed Nov. 16, 2001); *Kimmel v. Tex. A&M Univ., et al.*, No. G-01-CV-719 (S.D. Tex. filed Nov. 16, 2001); *Scanlan v. Tex. A&M Univ., et al.*, No. G-01-CV-733 (S.D. Tex. filed Nov. 19, 2001); and *Self, et al. v. Tex. A&M Univ., et al.*, No. G-01-CV-721 (S.D. Tex. filed Nov. 16, 2001). The Plaintiffs are, in *Breen*, the brother/administrator and parents of Christopher Breen, a former student killed in the collapse; in *Comstock*, John Andrew Comstock, the most severely injured surviving victim of the collapse, and his mother; in *Davis*, Bill

(Continued on following page)

pending before the Court wherein the Plaintiffs allege that Texas A&M University ("the University") and various former and present high-level University employees[2] ("University Officials") violated 42 U.S.C. § 1983 when they deprived the Bonfire victims of their Fourteenth Amendment right to substantive due process by acting with deliberate indifference to the state created danger that killed or injured them. Plaintiffs further allege that Defendants negligently harmed the victims in violation of Texas state law.[3] On May 24, 2002, Defendants filed a

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Davis, one of the students injured in the collapse; in *Kimmel,* the estate and parents of Lucas Kimmel, one of the students killed in the collapse; in *Scanlan,* Lauren Scanlan, one of the students injured in the collapse, and her parents; and in *Self,* the mother/administrator of Jerry Don Self (student killed), the mother/administrator and father of Bryan McClain (student killed); the father/administrator and mother of Christopher Lee Heard (student killed), the father/administrator and mother of Chad Powell (student killed), Matthew Robbins (student injured), Dominic Braus (student injured) and his mother. In all, these six suits represent eleven (six killed, five injured) of the thirty-nine total victims of the Bonfire collapse.

[2] The University Officials include: Russell Thompson; Dr. J. Malon Southerland; Dr. William Kibler; Dr. John J Koldus, III; Dr. Ray M. Bowen; Dr. Kevin Jackson; Dr. Zack Coapland; Maj. Gen. M.T. Hopgood; Brig. Gen. Don Johnson; Maj. Rebecca Ray; Jim Reynolds; Robert Harry Stiteler; and Michael Krenz. Only Thompson, Bowen and Southerland are named as Defendants in all six suits. The remaining individuals are named as Defendants in *Self* only, or *Self* and *Comstock.* The Court will hereinafter refer to the University and the University Officials together as "Defendants."

[3] The *Self* and *Comstock* Plaintiffs have also asserted state law claims against a number of Defendants who, although intimately involved with the University, were not employed by the University at the time of the Bonfire collapse. The analysis in Part II and Part III of this Order pertains only to the merits of Plaintiffs' claims against the University and the University Officials; and in no way comments upon the validity of any Bonfire-related claim, filed by any Plaintiff, against any non-state actor Defendant.

Motion for Summary Judgment wherein they assert that they are immune from liability with respect to Plaintiffs' federal and state law claims and alternatively, that Plaintiffs have failed to state a viable cause of action upon which relief can be granted.[4] After very carefully and thoughtfully considering Defendants' well-prepared Motion, Plaintiffs' insightful Responses thereto, the lengthy record in this matter and the applicable law, the Court concludes that Defendants' Motion for Summary Judgment must be **GRANTED IN PART** with respect to Plaintiffs' federal law claims. For reasons set forth below, the Court need not reach the merits of Defendants' Motion for Summary Judgment with respect to Plaintiffs' allegations of negligence, as the Court respectfully declines to exercise supplemental jurisdiction over Plaintiffs' state law claims.[5]

I.

The following facts are primarily derived from the Final Report of the Special Commission on the 1999 Texas A&M Bonfire ("Final Report"). At this stage of the proceedings, the Parties have accepted the Final Report – the product of hundreds of hours of investigation and expert analysis – as an authoritative account of the history of Bonfire, the mechanics of the 1999 collapse and the factors that contributed to this far-reaching tragedy. The Court

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[4] Defendants' Motion for Summary Judgment incorporates the legal arguments and authorities contained within their Rule 12(b)(6) Motion to Dismiss, filed December 19, 2001.

[5] Several of the Plaintiffs are not asserting state law claims in the instant lawsuits, as they have already filed such claims in various state courts. Part IV of this Order, which pertains to the Court's supplemental jurisdiction, is therefore inapplicable to those Plaintiffs.

likewise adopts the Final Report as a definitive narrative of the relevant facts for purposes of its instant analysis. However, because the Court wishes to provide as comprehensive of a factual summary as possible, the following account also includes several facts gleaned from the summary judgment evidence.

The much loved and revered Texas A&M Bonfire tradition began humbly, with a burning trash heap in 1909. Over the ensuing ninety years, Bonfire grew into one of the most cherished traditions of Texas A&M University, uniting students, administrators, alumni and the surrounding community each September, October and November. The process of cutting trees into logs, stacking the logs into a towering structure and preparing to ceremoniously burn the edifice on the eve of Texas A&M's annual football game with the University of Texas occupied over five thousand students for an estimated 125,000 hours each fall. At the culmination of these efforts, an estimated forty to eighty thousand individuals gathered annually to watch Bonfire ignite and burn. The University's students, or "Aggies," believe that Bonfire symbolizes their burning desire to "beat the hell out of t.u" at the next day's football game. It is symbolic not only of one school deeply rooted in tradition, but is representative of the entire Nation's passionate fascination with the most venerated aspects of collegiate football.

Bonfire may have started out as a pile of wood and trash, but by 1999, it had evolved into a massive structure with measurable technical complexity. The initial switch from trash to logs took place in the 1940s, when the students introduced a center pole and a teepee-shaped design. Because a teepee-shaped structure can only reach as high as its tallest log, the students began building

Bonfire with multiple layers of logs in the 1960s. The 1968 and 1969 Bonfires utilized this multi-tier design, with the 1969 Bonfire reaching 109 feet – the tallest Bonfire ever recorded. In the late 1970s, Bonfire began to take on a wedding cake-shaped design, with multiple cylindrical layers stacked one on top of the other. Since the 1980s, all Bonfires have been (1) built in the wedding cake design; (2) sixty to eighty feet tall; (3) six tiers bound with wire; (4) built around a two-part spliced center pole; and (5) surrounded by four perimeter poles with guy ropes. A completed 1990s Bonfire likely weighed over two million pounds. No other institution of higher learning in the world lays claim to a blazing bonfire of such monumental proportions, and it is an instantly recognizable source of pride and "fighting spirit" to past, present and future Aggies around the globe.

Even in light of Bonfire's massive proportions, its design and construction always remained almost the exclusive purview of the students. The "Redpots," student leaders between the ages of 19 and 21, controlled the Bonfire build year after year. The Redpots were not licensed engineers or architects, lacked formalized construction training and were not required to attend classes on architectural design or building techniques. Moreover, Redpots possessed less than two months experience as "Junior Redpots" before being promoted to Redpots as seniors, failed to utilize blueprints and relied on building techniques that were passed down orally from their student predecessors. Yet Defendants entrusted the Redpots with the primary responsibility for erecting the enormous Bonfire each fall.

Defendants undoubtedly recognized the dangers of Bonfire. In fact, one University document noted that "[i]t

is a well-established fact that Bonfire constitutes by far the single most liability laden student activity on campus." Other University documents warned that "Bonfire is, by its vary nature, a hazardous activity"; "Bonfire involves thousands of students engaged in a variety of activities, some of which involve potential risks and liability and therefore supervision is paramount"; and "[a]s we all are aware, Bonfire is a very risky undertaking from a safety and liability perspective." Blaine Lewis, a Junior Redpot, wrote in a 1997 paper that stacking the Bonfire's logs "has the potential for great tragedy at any time." Against this backdrop, the University purchased a two million dollar general liability insurance policy to insure against a catastrophic disaster on campus.

Nevertheless, very few truly significant restrictions were ever imposed, communicated or uniformly enforced to protect the safety of Bonfire participants. However, Defendants did not ignore Bonfire safety altogether. Faculty and staff frequently visited the Bonfire site for observation purposes. Defendants created the faculty post of "Bonfire Advisor," implemented a policy that restricted access to the Bonfire site during construction and intermittently passed other safety measures in response to particular "trigger" events. For instance, Defendants (1) imposed a fifty-five foot height restriction on Bonfire in response to fire hazard complaints; (2) required Bonfire participants to attend tree-cutting training programs after they received reports of cut-site accidents; (3) appointed an alcohol awareness committee and organized the "Don't Shatter the Tradition" campaign to combat excessive Bonfire-related drinking; and (4) prohibited students from riding in the back of pick-up trucks after a motor vehicle fatality. The Final Report characterizes this conduct as a "reactive risk

management model" and explains that Defendants only implemented very specific remedial measure in response to specific triggers. Apparently, no specific events or incidents triggered Defendants to query whether Bonfire was structurally unsound prior to 1999. Consequently, they never inquired into Bonfire's structural integrity; and therefore neglected to reexamine Bonfire's design prior to the collapse.

It can be reasonably argued that Defendants *should* have undertaken a study of Bonfire's structural soundness in 1994. That year, the partly constructed edifice suffered a partial collapse (or "lean") that should have alerted the State Defendants of Bonfire's instability. However, the 1994 mishap was attributed by those involved to wet and unstable ground, not structural integrity. In fact, those involved praised the structural integrity of the 1994 Bonfire because heavy equipment was needed to pull the stack apart. Consequently, the mishap failed to trigger a design re-examination. According to the Final Report, the "people obviously concerned with Bonfire safety, did in fact misinterpret these events and missed clear warning signs about structural integrity. This tunnel vision in decision [was] due . . . to a cultural bias in which legitimate courses of action outside past experience or contrary to the University's pre-disposition are often not considered. . . . More objective interpretations or more conservative interpretations, which might have led to a structural reassessment, could reasonably have been considered."

Regrettably, because of Defendants' reluctance to depart from or question "the way its always been," no one viewed the 1999 Bonfire as a potentially hazardous towering structure tenuously held together with wire. More significantly, no one proposed a sweeping reassessment of

Bonfire's construction process. And the results were catastrophic and heartbreaking. The 1999 Bonfire collapsed prior to completion, killing twelve students and injuring twenty-seven others, resulting in an enormous groundswell of grief and remorse which continues to reverberate to the deepest recesses of the worldwide Aggie community.

The Final Report characterizes the physical mechanics of the collapse as a "containment failure" in the first tier of logs, primarily caused by (1) excessive internal stresses driven primarily by aggressive wedging of second tier logs into the first tier; and (2) inadequate containment strength caused by insufficient binding support in the wiring used to tie the logs together. Moreover, the first stack of the 1999 Bonfire was not wrapped with steel cables, further reducing containment strength. Steel cables had been wrapped around the first tier as a matter of course for several years prior to 1999. The Final Report also identifies the overarching factors that brought about the physical collapse: the absence of a proactive risk management model; the University community's cultural bias impeding risk identification; the lack of student leadership knowledge and skills pertaining to structural integrity; and the lack of formal, written Bonfire design plans or construction methodology. Together, these factors created an environment wherein students were permitted to construct a complex and dangerous structure without adequate engineering supervision or physical safety controls and led to a complex organizational failure. The Bonfire collapse was not caused by a specific event, error or omission in 1999, but, rather, by decisions and actions taken by both students and University officials over many, many years.

II.

The Court will initially consider Plaintiffs' § 1983 claims against the University, before turning to Plaintiffs' claims against the University Officials. In their Motion for Summary Judgment, Defendants maintain that the University is entitled to summary judgment in its favor on the basis of Eleventh Amendment immunity. The Court agrees.

The University is a state-funded state institution of higher education. *See* Tex. Educ. Code § 86.02 (signifying that Texas A&M University was created by the laws of the State of Texas). Consequently, Plaintiffs are barred from bringing this suit against the University unless they are able to overcome the State's jurisdictional immunity in federal court, commonly referred to as "Eleventh Amendment" immunity.[6] *See Quern v. Jordan,* 440 U.S. 332, 341, 99 S. Ct. 1139, 1145, 59 L.Ed.2d 358 (1979). Eleventh Amendment immunity prohibits actions against a state entity in federal court, unless either the state has waived its sovereign immunity or Congress, pursuant to another provision in the Constitution, has expressly abrogated the state's immunity. *See Will v. Mich. Dept. of State Police,* 491 U.S. 58, 66, 109 S. Ct. 2304, 2309-10, 105 L.Ed.2d 45 (1989); *Welch v. Tex. Dept. of Highways and Pub. Transp.,* 483 U.S. 468, 473-74, 107 S. Ct. 2941, 2946, 97 L.Ed.2d 389 (1987). A state's intention to waive its sovereign

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[6] The Court notes that "Eleventh Amendment" immunity is not actually derived from the Eleventh Amendment to the Constitution. *See Alden v. Maine,* 527 U.S. 706, 713, 199 S. Ct. 2240, 2246, 144 L.Ed.2d 636 (1999) (explaining that the phrase "Eleventh Amendment immunity" is "convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment.").

immunity must be "unequivocally expressed." *Stem v. Ahearn,* 908 F.2d 1, 4 (5th Cir. 1990) (citing *Port Authority Trans-Hudson Corp. v. Feeney,* 495 U.S. 299, 305-06, 100 S. Ct. 1868, 1873, 109 L.Ed.2d 264 (1990)). Significantly, Texas has not consented to be sued in federal court by individuals regarding the 1999 Bonfire collapse, nor has state sovereign immunity been abrogated or compromised by Congress with the passage of § 1983. The Supreme Court has held, in fact, that states are not "persons" subject to suit within § 1983's scope. *See Arizonans for Official English v. Ariz.,* 520 U.S. 43, 69, 117 S. Ct. 1055, 1069, 137 L.Ed.2d 170 (1997) (citing *Will,* 491 U.S. at 71, 109 S. Ct. at 2312); *see also Cronen v. Tex. Dept. of Human Servs.,* 977 F.2d 934, 936 (5th Cir. 1992); *Stem,* 908 F.2d at 4. Accordingly, the Court finds that the University is shielded from liability in this matter by its Eleventh Amendment immunity, as a matter of law.[7] Consequently, Defendants' Motion for Summary Judgment is hereby **GRANTED** with respect to Plaintiffs' federal law claims

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[7] Previous decisions of the Fifth Circuit and District Courts within the Southern District of Texas have consistently afforded Eleventh Amendment immunity to state universities, including Texas A&M. *See, e.g., Tex. ex rel. Bd. of Regents of Univ. of Tex. Sys. v. Walker,* 142 F.3d 813, 820 n. 10 (5th Cir. 1998) (citing *Regents of Univ. of Cal. v. Doe,* 519 U.S. 425, 429-31, 117 S. Ct. 900, 903-04, 137 L.Ed.2d 55 (1997) and *United Carolina Bank v. Bd. of Regents of Stephen F. Austin State Univ.,* 665 F.2d 553, 556-61 (5th Cir. 1982)); *Mangaroo v. Nelson,* 864 F.2d 1202, 1204 (5th Cir. 1989); *Gay Student Servs. v. Tex. A&M Univ.,* 737 F.2d 1317, 1333-334 (5th Cir. 1984); *Lowery v. Univ. of Houston-Clear Lake,* 82 F. Supp.2d 689, 693 (S.D. Tex. 2000); *Chacko v. Tex. A&M Univ.,* 960 F. Supp. 1180, 1197-198 (S.D. Tex. 1997); *Baldwin v. Univ. of Tex. Med. Branch at Galveston,* 945 F. Supp. 1022, 1030 (S.D. Tex. 1996); *Idoux v. Lamar Univ. Sys.,* 817 F. Supp. 637, 639-640 (E.D. Tex. 1993); *Zentgraf v. Tex. A&M Univ.,* 492 F. Supp. 265, 271-72 (S.D. Tex. 1980).

against the University and each and all of those claims are hereby **DISMISSED WITH PREJUDICE.**

III.

Plaintiffs also allege that the University Officials are liable for the harm that befell the Bonfire victims pursuant to § 1983.[8] In response, Defendants contend that Plaintiffs' § 1983 claim against the University Officials must be dismissed pursuant to Fed. R. Civ. P. 12(b)(6), or, alternatively, on qualified immunity grounds. The Court need not reach the qualified immunity issue, however, because Defendants correctly assert that a Rule 12(b)(6) dismissal is warranted.

Legal Standard for Rule 12(b)(6) Dismissal

The Federal Rules of Civil Procedure authorize a court, upon suitable showing, to dismiss any action or any claim within an action for failure to state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6). Put another way, Rule 12(b)(6) dismissal is appropriate when the "the plaintiff would not be entitled to relief under any set of facts or any possible theory that he could prove consistent with the allegations in his complaint." *Jones v. Greninger,* 188 F.3d 322, 324 (5th Cir. 1999); *see also* Fed. R. Civ. P. 12(b)(6). When making this determination, the Court accepts as true all well-pleaded allegations in the complaint, and views them in a light most favorable to the plaintiff. *See Malina v. Gonzales,* 994 F.2d 1121,

[8] Plaintiffs have sued the University Officials in their individual capacities only.

1125 (5th Cir. 1993). A plaintiff must plead specific facts in order to avoid dismissal for failure to state a claim and consequently, the Court will not accept conclusory allegations or unwarranted deductions of fact contained within the plaintiff's complaint as true. *See Tuchman v. DSC Communications Corp.,* 14 F.3d 1061, 1067 (5th Cir. 1994). Unlike a Motion for Summary Judgment, a Motion to Dismiss should be granted only when it appears without a doubt that the plaintiff can prove no set of facts in support of his claims that would entitle him to relief. *See Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L.Ed.2d 80 (1957).

In considering a motion to dismiss for failure to state a claim, a district court must limit itself to the contents of the pleadings, including attachments thereto. *See* Fed. R. Civ. P. 12(b)(6). However, "[d]ocuments that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to [the plaintiff's] claims." *Collins v. Morgan Stanley Dean Witter,* 224 F.3d 496, 498-99 (5th Cir. 2000) (citing *Venture Assoc. Corp. v. Zenith Data Sys. Corp.,* 987 F.2d 429, 431 (7th Cir. 1993)); *see also Chambers v. Time Warner, Inc.,* 282 F.3d 147, 153 (2d Cir. 2002); *Branch v. Tunnell,* 14 F.3d 449, 453-54 (9th Cir. 1994); *In re Securities Litigation BMC Software, Inc.,* 183 F. Supp.2d 860, 883 (S.D. Tex. 2001); *Franks v. Prudential Health Care Plan, Inc.,* 164 F. Supp.2d 865, 872 (S.D. Tex. 2001). By attaching documents that are integral to the plaintiff's claims, "the defendant merely assists the plaintiff in establishing the basis of the suit, and the court in making the elementary determination of whether a claim has been stated." *Collins,* 224 F.3d at 499. In these cases, the Complaints on file repeatedly refer to the Final

Report; and Plaintiffs' allegations are clearly based upon the findings contained therein. Accordingly, in reviewing Plaintiffs' federal claims under Rule 12(b)(6), the Court will equally consider the Plaintiffs' well-pleaded allegations and the facts set out in the Final Report.

42 U.S.C. § 1983

Section 1983 provides a cause of action against "[e]very person who, under color of any statute . . . of any State . . . subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws. . . ." 42 U.S.C. § 1983; *see also Moore v. Willis Indep. Sch. Dist.*, 233 F.3d 871, 874 (5th Cir. 2000) (citing *Leffall v. Dallas Indep. Sch. Dist.*, 28 F.3d 521, 525 (5th Cir. 1994)). "Rather than creating substantive rights, § 1983 simply provides a remedy for the rights that it designates." *Johnston v. Harris County Flood Control Dist.*, 869 F.2d 1565, 1573 (5th Cir. 1989). The assertion of an underlying constitutional or statutory violation is therefore a predicate to liability under § 1983. *See id.* In their attempt to establish federal liability against the University Officials, Plaintiffs premise their § 1983 claims upon an alleged substantive due process violation, arising from the "state created danger" theory.[9]

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[9] Defendants initially argue that Plaintiffs' § 1983 claims must be dismissed because the state created danger theory was not well-settled law in this Circuit at the time of the Bonfire collapse. The Court rejects this argument, however because the Fifth Circuit's recent decision in *McClendon v. City of Columbia*, 258 F.3d 432 (5th Cir. 2001), explains that the state created danger theory was the law in this Circuit well-before 1999. *See id.* at 441 ("We conclude that . . . [on July 12, 1993] it

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State Created Danger Theory

In general, state governments are under no affirmative duty to provide protective services: "[T]he Due Process Clause generally confers no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty or property interests of which the government itself may not deprive the individual ... [Thus,] a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 196-97, 109 S. Ct. 998, 1003-04, 103 L.Ed.2d 249 (1989); *see also McClendon v. City of Columbia,* 258 F.3d 432, 436 (5th Cir. 2001); *Walton v. Alexander,* 44 F.3d 1297, 1302 (5th Cir. 1995) (*en banc*). Rather, the Constitution imposes a duty on the state to protect particular individuals only in "certain limited circumstances." *DeShaney,* 489 U.S. at 198, 109 S. Ct. at 1004. The Fifth Circuit has recognized two such limited scenario, namely, when the state has a special relationship with the person or when the state exposes a person to a danger of its own creation, or a "state created danger." *See McClendon,* 258 F.3d at 436. Plaintiffs do not argue that the University Officials had a special relationship with the

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was clearly established that a state actor creating a danger, knowing of that danger, and using his authority to create an opportunity for a third person to commit a crime that otherwise might not have existed, was subject to liability for a violation of the victim's rights."). The fact that the Fifth Circuit recently agreed to rehear *McClendon en banc* does not change the Court's conclusion. *McClendon* is the best authority currently available on this issue and the Court sees no reason to depart from its reasoning. On the assumption that this ruling will be appealed, the Parties are of course free to seek reassessment of the present state of the law. But any modification thereof is a policy consideration best left to the Fifth Circuit.

Bonfire victims, rather, they allege that the University Officials violated the Due Process Clause by failing to protect the victims from a state created danger.

The Fifth Circuit set out the two basic requirements of the state created danger theory in *Piotrowski v. City of Houston,* 51 F.3d 512 (5th Cir. 1995). A plaintiff asserting such a claim must show the (1) the state actors increased the danger to him or her; and (2) the state actors acted with deliberate indifference. *See id.* at 515; *see also McClendon,* 258 F.3d at 437; *Doe v. Hillsboro Indep. Sch. Dist.,* 113 F.3d 1412, 1415 (5th Cir. 1997); *Johnson v. Dallas Indep. Sch. Dist.,* 38 F.3d 198, 201 (5th Cir. 1994). Plaintiffs allege that the University Officials created a danger by failing to ensure the Bonfire's structural integrity. The facts surrounding the Bonfire collapse clearly tend to suggest that the conduct of the University Officials may have contributed, at least in part, to the 1999 Bonfire collapse. But *even if* the University Officials created an environment that was dangerous to the Bonfire victims (and the Court is expressly not now so finding), it is quite clear that they did not do so with "deliberate indifference" – the requisite culpability to make out a constitutional violation.[10]

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[10] Furthermore, *even if* the University Officials did create an environment that was dangerous to the Bonfire victims, that fact appears to be insufficient to satisfy the first requirement for the state created danger theory. The Final Report concluded that the students who were building the 1999 Bonfire (a group which includes the students who were killed and/or harmed) also played a role in the harm that befell them. None of the Fifth Circuit cases recognizing the state created danger doctrine have involved an incident for which the victims were partially at fault. Rather, the relevant cases have only recognized state created dangers where state actors created situations that increased the risk of danger from *third parties* to specific individuals.

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Deliberate Indifference

There is a significant distinction between a tort and a *constitutional* wrong. *Leffall,* 28 F.3d at 532 (citing *de Jesus Benavides v. Santos,* 883 F.2d 385, 388 (5th Cir. 1989)). The Supreme Court has made it clear that "[t]he Due Process Clause of the Fourteenth Amendment is not implicated by the lack of due care of an official causing unintended injury to life, liberty or property." *Davidson v. Cannon,* 474 U.S. 344, 347, 106 S. Ct. 668, 670, 88 L.Ed.2d 677 (1986). Rather, reckless or grossly negligent conduct by state officials falls squarely within the ambit of traditional state tort law. *See de Jesus Benavides,* 883 F.2d at 388. Simply put, where a government official is merely negligent in causing the injury, no procedure for compensation is *constitutionally* required. *See Davidson,* 474 U.S. at 347, 106 S. Ct. at 670. Accordingly, the conduct of a state actor fails to violate a victim's right to substantive due process unless that conduct is carried out with deliberate indifference.

The Fifth Circuit defines "deliberate indifference" as "'a lesser form of intent' rather than a 'heightened form of negligence.'" *Leffall,* 28 F.3d at 531; *Doe v. Taylor Indep. Sch. Dist.,* 15 F.3d 443, 453 n.13 (5th Cir. 1994) (explaining that deliberate indifference involves a higher degree of certainty than gross negligence). To establish deliberate indifference, "the environment created by the state actors must be dangerous; they must know it is dangerous; and . . . they must have used their authority to create an opportunity that would not otherwise have existed for the

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See, e.g. McClendon, 258 F.3d at 432; *Piotrowski v. City of Houston,* 51 F.3d at 512; *Johnson,* 38 F.3d at 198. On this basis alone, the state created danger theory is legally inapplicable here.

. . . crime to occur." *Johnson,* 38 F.3d at 201. Deliberate indifference can arise from "tortious conduct exceeding mere negligence but not quite rising to the level of intentional, e.g. deliberate (or conscious) indifference, recklessness or gross negligence." *Salas v. Carpenter,* 980 F.2d 299, 307 (5th Cir. 1992). Essentially, "[t]he key to the state created danger cases . . . lies in the state actors' culpable knowledge and conduct in affirmatively placing an individual in a position of danger, effectively stripping a person of [his or] her ability to defend [himself or] herself, or cutting off potential sources of private aid." *Johnson,* 38 F.3d at 201 (quotations and citations omitted).

In *Johnson,* the Fifth Circuit noted that *Wood v. Ostrander,* 879 F.2d 583 (9th Cir. 1989), exemplifies the state created danger theory of liability. In that case, a police officer arrested a drunken driver and impounded his car, leaving the driver's female passenger alone at night, without any means of getting home, in an area notorious for criminal activity. She was subsequently raped by a stranger who offered her a ride. *See id.* at 586. Other cases applying the state created danger theory are to a similar effect. *See, e.g. Dwares v. City of New York,* 985 F.2d 94, 99 (2d Cir. 1993) (holding that it would violate due process for police officers to conspire with and sanction violence by "skinheads" against persons burning American flags); *L.W. v. Grubbs,* 974 F.2d 119, 121-22 (9th Cir. 1992) (holding that § 1983 plaintiff had stated a claim by alleging that she was a nurse employed by the state, that her supervisors had instructed her to work alone with a known sex offender after leading her to believe that she would not be made to work under such conditions and that she had been assaulted by the sex offender while alone with him); *Freeman v. Ferguson,* 911 F.2d 52 (8th Cir. 1990) (finding a

viable § 1983 claim where a woman was killed by her estranged husband after the chief of police had directed his officers to ignore her pleas that they stop the husband, who was the police chief's friend, from threatening and intimidating her); *White v. Rochford,* 592 F.2d 381, 382-83 (7th Cir. 1979) (finding that two small children stated a § 1983 claim by alleging that police officers arrested their uncle and left them unattended in a car on the side of the freeway). In light of these authorities, the Court emphasizes that deliberate indifference arises in cases involving conduct that is substantially more abhorrent, and significantly more detestable, than even gross negligence.

The conduct of the University Officials does not rise to such a level, as a matter of law. As demonstrated by the Final Report, there is *no* evidence that the University Officials were aware of the impending Bonfire collapse. To the contrary, the Final Report concluded that "[n]o one in the [University's] administration ever interpreted ongoing behavioral problems as indications that safe Bonfire design and construction was beyond the capabilities of student leaders." Nor do the facts suggest that the University Officials directly prevented increased Bonfire safety or opposed a review of Bonfire's structural integrity. They simply failed to recognize that change was desperately needed. They built Bonfire the way that it had always been built and the way that it had always succeeded. For them, Bonfire was, and is, an institution. And, as stated in the Final Report, "leaders do not change institutions unless there is a clearly perceived need to do so."

The record presently before the Court amply demonstrates that the University Officials were aware of the dangers posed by Bonfire. Consequently, it can be persuasively argued that they may have acted negligently,

possibly even grossly so, and that the Bonfire collapse could have been prevented had cautionary measures been implemented. However, despite their knowledge of Bonfire's extremely risky nature and their failure to proactively avert or reduce those risks, the evidence equally shows that the University Officials were unaware of the *precise* risk at hand – the risk that the entire Bonfire would come tumbling down. Rather, the University Officials believed that ninety years of successful Bonfire building experience was enough in itself to ensure that the tradition would safely continue. Although the University Officials' lack of awareness might appear naive, and possibly even foolish, in retrospect, it cannot support a finding of deliberate indifference. This is not a case in which state actors "brought the victim into close proximity with a specific individual known to be likely to commit violence, . . . or abandoned the victim in a highly dangerous environment, . . . or conspired with [a] private actor who inflicted the deprivation." *Leffall,* 28 F.3d at 531. Plaintiffs concede that the University Officials took *some* measures to ensue Bonfire safety (i.e. height restriction, appointment of a Bonfire advisor, tree-cutting training program, alcohol awareness committee, prohibition against riding in the back of pick-up trucks). Simply put, because the University Officials were indeed concerned with Bonfire Safety (albeit, in hindsight, not concerned enough, or in precisely the right way), the Court cannot conclude that their conduct rose to the egregious level of a constitutional violation, as a matter of law.[11] *See id.* at 531-32

[11] The Court acknowledges that the existence of deliberate indifference is often a factual determination. However, because the Final Report affirmatively discloses that the University Officials in this case lacked the requisite culpability with respect to the alleged violation of the

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(concluding that even if school officials' decision to sponsor dance at high school, despite awareness of dangers posed thereby, was negligent, such conduct did not rise to the level of deliberate indifference to the rights of a student who was killed by random gunfire in the school parking lot after the dance); *Doe,* 15 F.3d at 456 n.12 (observing that "good faith but ineffective responses" by state actors tend to defeat claims of deliberate indifference). In reaching this conclusion, the Court in no way condones the reactive risk management policy of the University Officials or their cultural bias against departing from tradition in favor of newer safer measures. Rather, the Court recognizes the distinction between state law torts and constitutional wrongs. Expanding the substantive due process clause to encompass the allegations at issue here would violate well-settled principles of constitutional law and expand the protections of the Fourteenth Amendment beyond their appointed boundaries. Therefore, because Plaintiffs fail to allege, and cannot allege, a cognizable substantive due process violation, as a matter of law, Plaintiffs' § 1983 claims against the University Officials warrant dismissal pursuant to Fed. R. Civ. P. 12(b)(6). Defendants' Motion for Summary Judgment is therefore **GRANTED** with respect to Plaintiffs' federal law claims against the University Officials and each and all of such claims are hereby **DISMISSED WITH PREJUDICE.**

Bonfire victims' constitutional rights, it is not only appropriate, but mandatory in this instance to conclude that the University Officials failed to act with deliberate indifference, as a matter of law.

IV.

Having dismissed all of Plaintiffs' federal law claims, the Court is now faced with six negligence lawsuits governed purely by state tort law. Thus, the Court must decide whether to retain supplemental jurisdiction over Plaintiffs' remaining claims. In evaluating this matter, the Court is guided by the supplemental jurisdiction statute, 28 U.S.C. § 1367. Section (a) of that statute provides that "in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to the claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). Section (c) of the statute refines the supplemental jurisdiction doctrine by enumerating four circumstances in which District Courts have discretion to decline supplemental jurisdiction over state law claims: (1) when the state law claims raise novel or complex issues of state law; (2) when the state law claims substantially predominate over the claims within the district court's original jurisdiction; (3) when the district court dismisses the claims over which it has original jurisdiction; and (4) in exceptional circumstances, if there are other compelling reasons for declining jurisdiction. 28 U.S.C. § 1367(c). In this case, the third factor enumerated in § 1367(c) is clearly present, and to only a slightly lesser extent, the second and fourth factors as well. The Court has dismissed all of the claims that were within the Court's original jurisdiction and only Plaintiffs' state law claims remain. And those claims are manifestly better suited for resolution by a state court, applying squarely applicable state law, in front of a jury of state citizens. Accordingly, the

Court respectfully declines to exercise its supplemental jurisdiction over Plaintiffs' state law claims. *See Noble v. White,* 996 F.2d 385, 395 (5th Cir. 1993) ("District courts enjoy wide discretion in determining whether to retain supplemental jurisdiction over a state law claim once all federal claims are dismissed"); *Rhyne v. Henderson,* 973 F.2d 386, 395 (5th Cir. 1992) ("The district court has properly dismissed all of the federal questions that gave it original jurisdiction in this case. Therefore, we find that the district court's dismissal of the state law claims was proper under 28 U.S.C. § 1367(c)"); *see also United Mine Workers of Am. v. Gibbs,* 383 U.S. 715, 726, 86 S. Ct. 1130, 1139, 16 L.Ed.2d 218 (1966) ("Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of the applicable law."). As such, Plaintiffs' state law claims are hereby **DISMISSED WITHOUT PREJUDICE.** Plaintiffs are free to re-file their state law claims against Defendants in state court, if they so desire, either by filing new actions or by seeking leave to intervene in the state cases that are already well underway. In doing so, Plaintiffs are of course subject to the applicable limitations requirements.[12] All Parties are to bear their own taxable costs, expenses and attorneys' fees incurred herein to date; and all other pending Motions, filed by any of the Parties to this litigation, are hereby **DENIED** as moot.

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[12] For the same reasons, the Court also declines to exercise supplemental jurisdiction over the *Self* and *Comstock* Plaintiffs' state law claims against the non-state actor Defendants. Thus, those claims are likewise **DISMISSED WITHOUT PREJUDICE**, rather to proceed in either new or extant state court litigation, as appropriate.

IT IS SO ORDERED.

DONE this 23rd day of July, 2002, at Galveston, Texas

/s/ Samuel B. Kent
SAMUEL B. KENT
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

JOHN COMSTOCK, et al. Plaintiffs, v. J. MALON SOUTHERLAND, et al. Defendants.	§ § § § § § § §	CIVIL ACTION NO. G-01-730

FINAL JUDGMENT

(Entered May 24, 2004)

Pursuant to the Court's Order, all claims brought by Plaintiff against Defendants are hereby **DISMISSED WITH PREJUDICE**. All relief not herein provided is expressly **DENIED**. All Parties are **ORDERED** to bear their own costs and attorneys' fees incurred herein to date. **THIS IS A FINAL JUDGMENT.**

IT IS SO ORDERED.

DONE this 21st day of May, 2004, at Galveston, Texas.

/s/ Samuel B. Kent
SAMUEL B. KENT
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

JOHN COMSTOCK, et al. Plaintiffs,	§	
J. MALON SOUTHERLAND, et al. Defendants.	§	CIVIL ACTION NO. G-01-730

ORDER GRANTING DEFENDANTS' RENEWED MOTION FOR SUMMARY JUDGMENT

(Entered May 24, 2004)

This lawsuit arises out of the tragic collapse of the Texas A&M Bonfire ("Bonfire") in the early hours of November 18, 1999, which killed twelve students and injured an additional twenty-seven. Now before the Court comes the Defendants' Renewed Motion for Summary Judgment. Because Defendants are entitled to qualified immunity from suit, the Motion is hereby **GRANTED**.

I. Background

The facts of this case have previously been laid out by this Court and the Fifth Circuit, and the Court will not repeat them in this Order. This action is one of six virtually identical lawsuits[1] now pending before the Court.

[1] The Court is issuing this Order in all six lawsuits, which are styled as *Breen v. Tex. A&M Univ., et al.*, No. G-01-CV-270 (S.D. Tex. filed Oct. 24, 2001); *Comstock v. Tex. A&M Univ., et al.*, No. G-01-CV-730 (S.D. Tex. filed Nov. 19, 2001); *Davis v. Tex. A&M Univ. et al.*, No.

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Plaintiffs allege that various former and present high-level employees of Texas A&M University[2] ("University Officials" or "Defendants") deprived the Bonfire victims of their Fourteenth Amendment right to substantive due process by acting with deliberate indifference to the state-created danger that killed or injured them. Plaintiffs further alleged violations of Texas law. In an Order dated July 23, 2002, the Court dismissed all of Plaintiffs' federal claims pursuant to Fed. R. Civ. P. 12(b)(6). The Court declined to exercise supplemental jurisdiction over Plaintiffs'

G-01-CV-720 (S.D. Tex. filed Nov. 16, 2001); *Kimmel v. Tex A&M Univ., et al.*, No. G-01-CV-719 (S.D. Tex. filed Nov. 16, 2001); *Scanlan v. Tex. A&M Univ., et al.*, No. G-01-CV-733 (S.D. Tex. filed Nov. 19, 2001); and *Self et al. v. Tex. A&M Univ., et al.*, No. G-01-CV-721 (S.D. Tex. filed Nov 16, 2001). The Plaintiffs are, in *Breen*, the brother/administrator and parents of Christopher Breen, a former student killed in the collapse; in *Comstock*, John Andrew Comstock, the most severely injured surviving victim of the collapse, and his mother; in *Davis*, Bill Davis, one of the students injured in the collapse; in *Kimmel*, the estate and parents of Lucas Kimmel, one of the students killed in the collapse; in *Scanlan*, Lauren *Scanlan*, one of the students injured in the collapse, and her parents; and in *Self*, the mother/administrator of Jerry Don Self (student killed), the mother/administrator and father of Bryan McClain (student killed), the father/administrator and mother of Christopher Lee Heard (student killed), the father/administrator and mother of Chad Powell (student killed), Matthew Robbins (student injured), Dominic Braus (student injured) and his mother. In all, these six suits represent eleven (six killed, five injured) of the thirty-nine total victims of the Bonfire collapse.

[2] The University Officials include: Russell Thompson; Dr. J. Malon Southerland; Dr. William Kibler; Dr. John J. Koldus, III; Dr. Ray M. Bowen; Dr. Kevin Jackson; Dr. Zack Coapland; Maj. Gen. M.T. Hopgood; Brig. Gen. Don Johnson; Maj. Rebecca Ray; Jim Reynolds; Robert Harry Stiteler; and Michael Krenz. Only Thompson, Bowen, and Southerland are named as Defendants in all six suits. The remaining individuals are named as Defendants in *Self* only, or *Self* and *Comstock*. The Court will hereinafter refer to the University Officials as "Defendants".

state-law claims, and the dismissal of those claims without prejudice was not appealed. Plaintiffs' claims against the University were dismissed on Eleventh Amendment immunity grounds, and no Plaintiff appealed that ruling. Plaintiffs' claims against the University Officials were dismissed after a determination that their actions did not rise to the level of deliberate indifference as a matter of law. It is that ruling that was appealed to the Fifth Circuit Court of Appeals. On August 19, 2003, the Fifth Circuit reversed this Court's findings as to the University Officials and remanded the case for further consideration consistent with its instructions. *See Scanlan v. Tex. A&M Univ.*, 343 F.3d 533 (5th Cir. 2003). The Court of Appeals found that this Court impermissibly relied upon the Final Report of the Special Commissioners on the 1999 Texas A&M Bonfire ("the Final Report"). *See id.* at 538. The Circuit found that without consideration of the Final Report, and construing allegations in a light most favorable to Plaintiffs, the University Officials were not entitled to a dismissal of the claims against them. *See id.* Upon remand, Plaintiffs renewed their Motions for Summary Judgment, which were originally filed in May of 2002. After additional briefing by both sides, those Motions are now ripe for consideration.

II. Summary Judgment Standard

Summary judgment is appropriate if no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S. Ct. 2548, 2552-53, 91 L. Ed. 2d 265 (1986). When one party moves for summary judgment, the nonmoving party must set forth specific facts showing that there is a genuine

issue for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986). Issues of material fact are "genuine" only if they require resolution by a trier of fact. *See id.* at 248, 106 S. Ct. 2510. The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; rather, only disputes over facts that might affect the outcome of the lawsuit under governing law will preclude the entry of summary judgment. *See id.* at 247-48, 106 S. Ct. 2510. Nevertheless, if the evidence is such that a reasonable fact-finder could find in favor of the nonmoving party, summary judgment should not be granted. *See id.*; *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986). Determining credibility, weighing evidence, and drawing reasonable inferences are left to the trier of fact. *See Anderson*, 477 U.S. at 255, 106 S. Ct. 2513.

III. Qualified Immunity Standard

The University Officials assert that they are entitled to qualified immunity against suit, and the claims against them should be dismissed. "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). "When a defendant invokes qualified immunity, the burden is on the plaintiff to demonstrate the inapplicability of the defense." *McClendon v. City of Columbia,* 305 F.3d 314, 323 (5th Cir. 2002). The University Officials' right to qualified immunity should be

determined through the application of a two-prong test. *See Saucier v. Katz,* 533 U.S. 194, 200, 121 S. Ct. 2151, 2155,150 L. Ed. 2d 272 (2001); *Mace v. City of Palestine,* 333 F.3d 621, 623 (5th Cir. 2003). The first question is whether the facts alleged, considered in a light most favorable to Plaintiffs, show that the University Officials' conduct violated a constitutional right. *Mace*, 333 F.3d at 623. If so, the Court must determine whether that right was clearly established at the time it was violated. That is, would it have been clear to a reasonable person that the Officials' conduct was unlawful under the circumstances? *Id.* at 624. Though it is necessary to consider the prongs in the order presented, the Court may find it necessary to lay out the factors that will aid it in determining whether the right was clearly established in the course of determining whether a constitutional violation actually exists. *See Saucier,* 533 U.S. at 201, 121 S. Ct. 2156.

A. Did the University Officials Violate Plaintiffs' Constitutional Rights?

Determining whether the University Officials violated Plaintiffs' constitutional rights requires two separate analyses: (1) is the right Plaintiffs claim a **constitutional** one; and (2) was that right actually violated? The Court first considers the nature of the right that Plaintiffs are claiming and then examines whether the facts as presented in the Summary Judgment evidence show a violation.

1. Do Plaintiffs claim a constitutional right?

Plaintiffs assert claims under 42 U.S.C. § 1983, which provides a cause of action against "[e]very person who,

under color of any statute . . . of any State . . . subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and the laws . . . " 42 U.S.C. § 1983. "Rather than creating substantive rights, § 1983 simply provides a remedy for the rights that it designates." *Johnston v. Harris County Food Control Dist.,* 869 F.2d 1565, 1573 (5th Cir. 1989). The assertion of an underlying constitutional or statutory violation is therefore a predicate to liability under § 1983. *See id.* In their attempt to establish federal liability against the University Officials, Plaintiffs premise their § 1983 claims upon an alleged substantive due process violation arising from the "state-created danger" theory.

In general, state governments are under no affirmative duty to provide protective services: "[T]he Due Process Clause generally confers no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty or property interests of which the government itself may not deprive the individual." *DeShaney v. Winnebago County Dep't of Social Servs.,* 489 U.S. 196-97, 109 S. Ct. 998, 1003-04, 103 L. Ed. 2d 249 (1989). "[A] State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *Id.* at 197, 109 S. Ct. 1004; *see also Walton v. Alexander,* 44 F.3d 1297, 1302 (5th Cir. 1995) (en banc). The Constitution imposes a duty on the state to protect particular individuals only in "certain limited circumstances." *DeShaney,* 489 U.S. at 198, 109 S. Ct. 1004. Courts have recognized two such limited scenarios: (1) when the state has a special relationship with the person; or (2) when the state exposes a person to a danger of its own creation – a "state-created danger." *See*

Piotrowski v. City of Houston, 51 F.3d 512, 516 (5th Cir. 1995) ("*Piotrowski I*") (citing *Salas v. Carpenter,* 980 F.2d 299, 307 (5th Cir. 1992)). Plaintiffs do not argue that the University Officials had a special relationship with the Bonfire victims; rather, they allege that by failing to ensure Bonfire's structural integrity, the University Officials violated the Due Process Clause by failing to protect the victims from a state-created danger.

The validity of the state-created danger theory is uncertain in the Fifth Circuit. Most recently, the Court of Appeals has noted: "We have never recognized state-created danger as a trigger of State affirmative duties under the Due Process Clause. We again decline to do [so]." *Rivera v. Houston Indep. Sch. Dist.,* 349 F.3d 244, 249 (5th Cir. 2003). However, the Fifth Circuit has on numerous occasions recognized and discussed the existence and elements of the doctrine as well as its acceptance in other Circuits. *See Randolph v. Cervantes,* 130 F.3d 727 (5th Cir. 1997); *Doe v. Hillsboro Indep. Sch. Dist.,* 113 F.3d 1412 (5th Cir. 1997); *Piotrowski I,* 51 F.3d 512; *Johnson v. Dallas Indep. Sch. Dist.,* 38 F.3d 198 (5th Cir. 1994); *Lefall v. Dallas Indep. Sch. Dist.,* 28 F.3d 521 (5th Cir. 1994); *Salas,* 980 F.2d at 307. In fact, in *Scanlan,* the Fifth Circuit expressly noted that "the district court should have concluded that the plaintiffs stated a section 1983 claim under the state-created danger theory." *Scanlan,* 343 F.3d at 538. In accordance with the Fifth Circuit's instructions in this case, the Court will consider Plaintiffs' claims of a state-created danger as if the theory is valid one. Accordingly, for purposes of further analysis, the Court will proceed under the conclusion that the violations Plaintiffs claim are indeed constitutional ones.

2. Were Plaintiffs' rights violated?

The Fifth Circuit has laid out the requirements a Plaintiff must meet in order to qualify for relief under the state-created danger theory. *See Piotrowski I*, 51 F.3d at 515. "First, a plaintiff must show that the state actors increased the danger to her. Second, a plaintiff must show that the state actors acted with deliberate indifference." *See id.*; *Doe,* 113 F.3d at 1415; *Johnson,* 38 F.3d at 201. Plaintiffs ultimately allege that the University Officials increased the danger to the victims by affirmatively delegating technical and complex Bonfire responsibilities to unqualified students without adequate supervision or guidelines. Defendants maintain that they "passively continued the status quo" and merely permitted students to do what they wanted. The resolution of these polar viewpoints requires examination of literally hundreds of facts. It would be inappropriate and virtually impossible for the Court to decide as a matter of law and based on the record now before the Court whether the state actors increased the danger to the Bonfire victims. Defendants are not entitled to summary judgment based on qualified immunity on the grounds that they did not increase the danger to the victims.

The Court's next analysis considers whether Defendants acted with deliberate indifference. There is a significant distinction between a tort and a *constitutional* wrong. *See Lefall,* 28 F.3d at 532 (citing *de Jesus Benavides v. Santos,* 883 F.2d 385, 388 (5th Cir. 1989)). The Supreme Court has made it clear that "[t]he Due Process Clause of the Fourteenth Amendment is not implicated by the lack of due care of an official causing unintended injury to life, liberty or property." *Davidson v. Canon,* 474 U.S. 344, 347, 106 S. Ct. 668, 670, 88 L. Ed. 2d 677 (1986). Where a

government official is merely negligent in causing the injury, no procedure for compensation is *constitutionally* required. *See id.* at 347, 106 S. Ct. 670. Even reckless or grossly negligent conduct by state officials falls squarely within the ambit of traditional state tort law. *See de Jesus Benavides,* 883 F.2d at 388. Accordingly, the conduct of a state actor does not violate a victim's right to substantive due process unless that conduct is carried out with deliberate indifference.

The Fifth Circuit defines "deliberate indifference" as "'a lesser form of intent' rather than a 'heightened form of negligence.'" *Lefall,* 28 F.3d at 531; *Doe v. Taylor Indep. Sch. Dist.,* 15 F.3d 443, 453 n.13 (5th Cir. 1994) (explaining that deliberate indifference involves a higher degree of certainty than gross negligence). To establish deliberate indifference, "the environment created by the state actors must be dangerous; they must know it is dangerous; and . . . they must have used their authority to create an opportunity that would not otherwise have existed for the . . . crime to occur." *Johnson,* 38 F.3d at 201. Deliberate indifference can arise from "tortious conduct exceeding mere negligence but not quite rising to the level of intentional, e.g. deliberate (or conscious) indifference, recklessness or gross negligence." *Salas,* 980 F.2d at 307. Essentially, "[t]he key to the state created danger cases . . . lies in the state actors' culpable knowledge and conduct in affirmatively placing an individual in a position of danger, effectively stripping a person of [his or] her ability to defend [himself or] herself, or cutting off potential sources of private aid." *Johnson,* 38 F.3d at 201 (quotations and citations omitted).

In this case, Plaintiffs argue that Defendants deliberately ignored the possible dangers of Bonfire in an effort to

avoid future liability. Defendants allege that they never knew or could have known that the Bonfire might collapse and therefore cannot be held liable under a deliberate indifference standard. In its Opinion in this case, the Fifth Circuit stated: "Whether deliberately delegating the construction of the bonfire stack to students the University Officials allegedly knew were not qualified to handle such a dangerous project, and whether deliberately providing no supervision to students building the bonfire even though they knew the students were not qualified to build the stack, constituted deliberate indifference presents fundamental questions of material fact" *Scanlan,* 343 F.3d at 539. Though this statement was made in an Opinion disposing of Defendants' Motion to Dismiss, the summary judgment evidence submitted since then has only muddied the waters further. At this stage in the proceedings, there remain multiple questions of fact as to whether Defendants acted with deliberate indifference. The existence of these questions prevents the Court from deciding whether Defendants did or did not act with deliberate indifference as a matter of law.

B. Was Defendants' Conduct Objectively Reasonable in Light of Clearly Established Law?

Notwithstanding the Court's conclusion that there exists a genuine issue of material fact concerning Defendants' violation of Plaintiffs' due process-based right to be free from state-created danger, Defendants are entitled to qualified immunity if their conduct was "objectively reasonable in light of the legal rules that were clearly established at the time of [their] actions." *McClendon,* 305 F.3d at 323. As noted above, the Circuit has recognized an individual's substantive due process right to be free from

state-created danger. *See Scanlan*, 343 F.3d at 538 (holding that this Court "should have concluded that the plaintiffs stated a section 1983 claim under the state-created danger theory"). By holding that Plaintiffs stated a claim upon which relief could be granted, the Circuit necessarily recognized as valid the theory of relief behind Plaintiffs' claims.[3]

Under qualified immunity analysis, the Court must determine whether the right to be free from state-created danger was clearly established under the Due Process Clause at the time of the events and activities in question. The Fifth Circuit first considered a state-created danger claim in *Salas v. Carpenter,* 980 F.2d 299 (5th Cir. 1992), a case involving a court clerk who was taken hostage and eventually killed by her estranged husband in the Tarrant County courthouse. The plaintiffs claimed that the Sheriff deprived the victim of her life by preventing the Police Department's SWAT and hostage negotiation teams from securing her release and by using incompetent hostage negotiators. *Id.* at 303. The Fifth Circuit held that the sheriff had not violated a constitutional right as a matter of law because, unlike the state officials in other state-created danger cases, the sheriff did not "worsen [the

[3] In the Court's understanding of Fifth Circuit due process jurisprudence, *Scanlan* charts a new course by affirmatively recognizing the state-created danger theory for the first time. In a later decision, however, the Fifth Circuit expressly disavowed *Scanlan's* apparent recognition of the state-created danger theory. *See Rivera,* 349 F.3d at 249 n.5 ("Despite remanding that case to the district court for further proceedings, we did not recognize the state-created danger theory."). Because the second prong of the qualified immunity inquiry focuses on the state of the law at the time of the activities underlying this lawsuit, however, this development does not materially affect Plaintiffs' claims.

victim's] position and abandon her to allow events to run their course." *Id.* at 309. In *McClendon,* decided ten years after *Salas,* the en banc Fifth Circuit stated that *Salas* "did not address the viability of the state-created danger theory"; therefore, *Salas* "would not have provided a reasonable officer with 'fair warning' that creating or increasing a danger to a known victim with deliberate indifference towards that victim violates the victim's substantive due process rights." *McClendon,* 305 F.3d at 330. In other words, the Fifth Circuit's discussion of the state-created danger theory in *Salas* did not clearly establish the right to be free from state-created danger.

The Fifth Circuit recognized in *McClendon* that many circuits have read *DeShaney* to mean that the Due Process Clause imposes an affirmative duty upon state officials to protect an individual from third-party violence "if the state actor played an affirmative role in creating or exacerbating a dangerous situation that led to the individual's injury." *McClendon,* 305 F.3d at 324. The Circuit specifically noted, however, that it had not recognized the state-created danger theory. *See id.* at 325 ("[W]e have not yet determined whether a state official has a similar duty to protect individuals from state-created dangers.") (citing *Piotrowski v. City of Houston,* 237 F.3d 567, 584 (5th Cir. 2001) ("*Piotrowski II*"); *Randolph,* 130 F.3d at 731). In the *McClendon* court's assessment, the Fifth Circuit's reluctance to endorse the state-created danger theory in the period since *Salas* suggested that "a reasonable officer in this Circuit would, even today, be unclear as to whether there is a right to be free from 'state-created danger.'" *Id.* at 332 n.12; *cf. Rivera,* 349 F.3d at 249 ("We have never recognized state-created danger as a trigger of State affirmative duties under the Due Process clause. We again

decline to do [so].") (citation and footnote omitted). *McClendon* highlights the significance of the Fifth Circuit's treatment of this question. The Circuit has not merely declined to recognize the state-created danger theory of substantive due process; it has scrupulously avoided it for more than ten years. The Fifth Circuit's reluctance to adopt the state-created danger theory is therefore not a mere neutral factor to be considered against the general consensus among other circuits, but a wanting that the Fifth Circuit might not join that consensus.[4]

The Court therefore concludes that the state-created danger theory of substantive due process was not clearly established at the time of Defendants' Bonfire-related activities. Because Plaintiffs' theory had not been adopted as a viable avenue to a substantive due process claim, a reasonable school official would not have been aware that the Fourteenth Amendment's Due Process Clause provided a constitutional right to be free from state-created danger, much less that an injury caused by a school administrator's failure to exercise control over an activity such as Bonfire would violate that right. Accordingly, Defendants are entitled to qualified immunity from Plaintiffs' § 1983 claims.

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[4] As the *McClendon* Court put it, "a strong consensus of authorities in other circuits is more likely to be determinative on a subject when this circuit is *tabula rasa* on that subject than when the landscape in this circuit is littered with opinions expressing varying levels of skepticism" *McClendon*, 305 F.3d at 332 n.12.

IV. Conclusion

For the reasons articulated above, Defendants' Renewed Motion for Summary Judgment is hereby **GRANTED**. All claims against the University Officials are **DISMISSED WITH PREJUDICE**. All Parties are to bear their own taxable costs, expenses, and attorneys' fees incurred herein to date. A Final Judgment will be issued concurrently with this Order.

IT IS SO ORDERED.

DONE this 21st day of May, 2004, at Galveston, Texas

/s/ Samuel B. Kent
SAMUEL B. KENT
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

JACQUELYNN KAY SELF et al.,	§	
Plaintiffs,	§	
J. MALON SOUTHERLAND, et al.	§	CIVIL ACTION NO. G-01-721
Defendants.	§	

FINAL JUDGMENT

(Entered May 24, 2004)

Pursuant to the Court's Order Granting Defendants' Renewed Motion for Summary Judgment, entered this date, all claims brought by Plaintiffs against Defendants are hereby **DISMISSED WITH PREJUDICE.** All relief not herein provided is expressly **DENIED**. All Parties are **ORDERED** to bear their own costs, attorneys' fees, and expenses incurred herein to date. **THIS IS A FINAL JUDGMENT.**

IT IS SO ORDERED.

DONE this 21st day of May 2004, at Galveston Texas.

/s/ Samuel B. Kent
SAMUEL B. KENT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

JACQUELYNN KAY SELF et al., Plaintiffs, J. MALON SOUTHERLAND, et al. Defendants.	§ § § § § § § §	CIVIL ACTION NO. G-01-721

ORDER GRANTING DEFENDANTS' RENEWED MOTION FOR SUMMARY JUDGMENT

(Entered May 24, 2004)

This lawsuit arises out of the tragic collapse of the Texas A&M Bonfire ("Bonfire") in the early hours of November 18, 1999, which killed twelve students and injured an additional twenty-seven. Now before the Court comes the Defendants' Renewed Motion for Summary Judgment. Because Defendants are entitled to qualified immunity from suit, the Motion is hereby **GRANTED**.

I. Background

The facts of this case have previously been laid out by this Court and the Fifth Circuit, and the Court will not repeat them in this Order. This action is one of six virtually identical lawsuits[1] now pending before the Court.

[1] The Court is issuing this Order in all six lawsuits, which are styled as *Breen v. Tex. A&M Univ., et al.*, No. G-01-CV-270 (S.D. Tex. filed Oct. 24, 2001); *Comstock v. Tex. A&M Univ., et al.*, No. G-01-CV-730 (S.D. Tex. filed Nov. 19, 2001); *Davis v. Tex. A&M Univ. et al.*, No.

(Continued on following page)

Plaintiffs allege that various former and present high-level employees of Texas A&M University[2] ("University Officials" or "Defendants") deprived the Bonfire victims of their Fourteenth Amendment right to substantive due process by acting with deliberate indifference to the state-created danger that killed or injured them. Plaintiffs further alleged violations of Texas law. In an Order dated July 23, 2002, the Court dismissed all of Plaintiffs' federal claims pursuant to Fed. R. Civ. P. 12(b)(6). The Court declined to exercise supplemental jurisdiction over Plaintiffs'

G-01-CV-720 (S.D. Tex. filed Nov. 16, 2001); *Kimmel v. Tex A&M Univ., et al.*, No. G-01-CV-719 (S.D. Tex. filed Nov. 16, 2001); *Scanlan v. Tex. A&M Univ., et al.*, No. G-01-CV-733 (S.D. Tex. filed Nov. 19, 2001); and *Self et al. v. Tex. A&M Univ., at al.*, No. G-01-CV-721 (S.D. Tex. filed Nov 16, 2001). The Plaintiffs are, in *Breen*, the brother/administrator and parents of Christopher Breen, a former student killed in the collapse; in *Comstock*, John Andrew Comstock, the most severely injured surviving victim of the collapse, and his mother; in *Davis*, Bill Davis, one of the students injured in the collapse; in *Kimmel*, the estate and parents of Lucas Kimmel, one of the students killed in the collapse; in *Scanlan*, Lauren Scanlan, one of the students injured in the collapse, and her parents; and in *Self*, the mother/administrator of Jerry Don Self (student killed), the mother/administrator and father of Bryan McClain (student killed), the father/administrator and mother of Christopher Lee Heard (student killed), the father/administrator and mother of Chad Powell (student killed), Matthew Robbins (student injured), Dominic Braus (student injured) and his mother. In all, these six suits represent eleven (six killed, five injured) of the thirty-nine total victims of the Bonfire collapse.

[2] The University Officials include: Russell Thompson; Dr. J. Malon Southerland; Dr. William Kibler; Dr. John J. Koldus, III; Dr. Ray M. Bowen; Dr. Kevin Jackson; Dr. Zack Coapland; Maj. Gen. M.T. Hopgood; Brig. Gen. Don Johnson; Maj. Rebecca Ray; Jim Reynolds; Robert Harry Stiteler, and Michael Krenz. Only Thompson, Bowen, and Southerland are named as Defendants in all six suits. The remaining individuals are named as Defendants in *Self* only, or *Self* and *Comstock*. The Court will hereinafter refer to the University Officials as "Defendants".

state-law claims, and the dismissal of those claims without prejudice was not appealed. Plaintiffs' claims against the University were dismissed on Eleventh Amendment immunity grounds, and no Plaintiff appealed that ruling. Plaintiffs' claims against the University Officials were dismissed after a determination that their actions did not rise to the level of deliberate indifference as a matter of law. It is that ruling that was appealed to the Fifth Circuit Court of Appeals. On August 19, 2003, the Fifth Circuit reversed this Court's findings as to the University Officials and remanded the case for further consideration consistent with its instructions. *See Scanlan v. Tex. A&M Univ.*, 343 F.3d 533 (5th Cir. 2003). The Court of Appeals found that this Court impermissibly relied upon the Final Report of the Special Commissioners on the 1999 Texas A&M Bonfire ("the Final Report"). *See id.* at 538. The Circuit found that without consideration of the Final Report, and construing allegations in a light most favorable to Plaintiffs, the University Officials were not entitled to a dismissal of the claims against them. *See id.* Upon remand, Plaintiffs renewed their Motions for Summary Judgment, which were originally filed in May of 2002. After additional briefing by both sides, those Motions are now ripe for consideration.

II. Summary Judgment Standard

Summary judgment is appropriate if no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2552-53, 91 L. Ed. 2d 265 (1986). When one party moves for summary judgment, the nonmoving party must set forth specific facts showing that there is a genuine

issue for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986). Issues of material fact are "genuine" only if they require resolution by a trier of fact. *See id.* at 248, 106 S. Ct. 2510. The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; rather, only disputes over facts that might affect the outcome of the lawsuit under governing law will preclude the entry of summary judgment. *See id.* at 247-48, 106 S. Ct. 2510. Nevertheless, if the evidence is such that a reasonable fact-finder could find in favor of the nonmoving party, summary judgment should not be granted. *See id.*; *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986). Determining credibility, weighing evidence, and drawing reasonable inferences are left to the trier of fact. *See Anderson,* 477 U.S. at 255, 106 S. Ct. 2513.

III. Qualified Immunity Standard

The University Officials assert that they are entitled to qualified immunity against suit, and the claims against them should be dismissed. "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). "When a defendant invokes qualified immunity, the burden is on the plaintiff to demonstrate the inapplicability of the defense." *McClendon v. City of Columbia,* 305 F.3d 314, 323 (5th Cir. 2002). The University Officials' right to qualified

immunity should be determined through the application of a two-prong test. *See Saucier v. Katz,* 533 U.S. 194, 200, 121 S. Ct. 2151, 2155, 150 L. Ed. 2d 272 (2001); *Mace v. City of Palestine,* 333 F.3d 621, 623 (5th Cir. 2003). The first question is whether the facts alleged, considered in a light most favorable to Plaintiffs, show that the University Officials' conduct violated a constitutional right. *Mace,* 333 F.3d at 623. If so, the Court must determine whether that right was clearly established at the time it was violated. That is, would it have been clear to a reasonable person that the Officials' conduct was unlawful under the circumstances? *Id.* at 624. Though it is necessary to consider the prongs in the order presented, the Court may find it necessary to lay out the factors that will aid it in determining whether the right was clearly established in the course of determining whether a constitutional violation actually exists. *See Saucier,* 533 U.S. at 201, 121 S. Ct. 2156.

A. Did the University Officials Violate Plaintiffs' Constitutional Rights?

Determining whether the University Officials violated Plaintiffs' constitutional rights requires two separate analyses: (1) is the right Plaintiffs claim a **constitutional** one; and (2) was that right actually violated? The Court first considers the nature of the right that Plaintiffs are claiming and then examines whether the facts as presented in the Summary Judgment evidence show a violation.

1. Do Plaintiffs claim a constitutional right?

Plaintiffs assert claims under 42 U.S.C. § 1983, which provides a cause of action against "[e]very person who, under color of any statute . . . of any State . . . subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and the laws . . . " 42 U.S.C. § 1983. "Rather than creating substantive rights, § 1983 simply provides a remedy for the rights that it designates." *Johnston v. Harris County Food Control Dist.,* 869 F.2d 1565, 1573 (5th Cir. 1989). The assertion of an underlying constitutional or statutory violation is therefore a predicate to liability under § 1983. *See id.* In their attempt to establish federal liability against the University Officials, Plaintiffs premise their § 1983 claims upon an alleged substantive due process violation arising from the "state-created danger" theory.

In general, state governments are under no affirmative duty to provide protective services: "[T]he Due Process Clause generally confers no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty or property interests of which the government itself may not deprive the individual." *DeShaney v. Winnebago County Dep't of Social Servs.,* 489 U.S. 196-97, 109 S. Ct. 998, 1003-04, 103 L. Ed. 2d 249 (1989). "[A] State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *Id.* at 197, 109 S. Ct. 1004; *see also Walton v. Alexander,* 44 F.3d 1297, 1302 (5th Cir. 1995) (en banc). The Constitution imposes a duty on the state to protect particular individuals only in "certain limited circumstances." *DeShaney,* 489 U.S. at 198, 109 S.

Ct. 1004. Courts have recognized two such limited scenarios: (1) when the state has a special relationship with the person; or (2) when the state exposes a person to a danger of its own creation – a "state-created danger." *See Piotrowski v. City of Houston,* 51 F.3d 512, 516 (5th Cir. 1995) ("*Piotrowski I*") (citing *Salas v. Carpenter,* 980 F.2d 299, 307 (5th Cir. 1992)). Plaintiffs do not argue that the University Officials had a special relationship with the Bonfire victims; rather, they allege that by failing to ensure Bonfire's structural integrity, the University Officials violated the Due Process Clause by failing to protect the victims from a state-created danger.

The validity of the state-created danger theory is uncertain in the Fifth Circuit. Most recently, the Court of Appeals has noted: "We have never recognized state-created danger as a trigger of State affirmative duties under the Due Process Clause. We again decline to do [so]." *Rivera v. Houston Indep. Sch. Dist.,* 349 F.3d 244, 249 (5th Cir. 2003). However, the Fifth Circuit has on numerous occasions recognized and discussed the existence and elements of the doctrine as well as its acceptance in other Circuits. *See Randolph v. Cervantes,* 130 F.3d 727 (5th Cir. 1997); *Doe v. Hillsboro Indep. Sch. Dist.,* 113 F.3d 1412 (5th Cir. 1997); *Piotrowski I,* 51 F.3d 512; *Johnson v. Dallas Indep. Sch. Dist.,* 38 F.3d 198 (5th Cir. 1994); *Lefall v. Dallas Indep. Sch. Dist.,* 28 F.3d 521 (5th Cir. 1994); *Salas,* 980 F.2d at 307. In fact, in *Scanlan,* the Fifth Circuit expressly noted that "the district court should have concluded that the plaintiffs stated a section 1983 claim under the state-created danger theory." *Scanlan,* 343 F.3d at 538. In accordance with the Fifth Circuit's instructions in this case, the Court will consider Plaintiffs' claims of a state-created danger as if the theory

is valid one. Accordingly, for purposes of further analysis, the Court will proceed under the conclusion that the violations Plaintiffs claim are indeed constitutional ones.

2. Were Plaintiffs' rights violated?

The Fifth Circuit has laid out the requirements a Plaintiff must meet in order to qualify for relief under the state-created danger theory. *See Piotrowski I,* 51 F.3d at 515. "First, a plaintiff must show that the state actors increased the danger to her. Second, a plaintiff must show that the state actors acted with deliberate indifference." *See id.; Doe,* 113 F.3d at 1415; *Johnson,* 38 F.3d at 201. Plaintiffs ultimately allege that the University Officials increased the danger to the victims by affirmatively delegating technical and complex Bonfire responsibilities to unqualified students without adequate supervision or guidelines. Defendants maintain that they "passively continued the status quo" and merely permitted students to do what they wanted. The resolution of these polar viewpoints requires examination of literally hundreds of facts. It would be inappropriate and virtually impossible for the Court to decide as a matter of law and based on the record now before the Court whether the state actors increased the danger to the Bonfire victims. Defendants are not entitled to summary judgment based on qualified immunity on the grounds that they did not increase the danger to the victims.

The Court's next analysis considers whether Defendants acted with deliberate indifference. There is a significant distinction between a tort and a *constitutional* wrong. *See Lefall,* 28 F.3d at 532 (citing *de Jesus Benavides v. Santos,* 883 F.2d 385, 388 (5th Cir. 1989)). The Supreme

Court has made it clear that "[t]he Due Process Clause of the Fourteenth Amendment is not implicated by the lack of due care of an official causing unintended injury to life, liberty or property." *Davidson v. Canon,* 474 U.S. 344, 347, 106 S. Ct. 668, 670, 88 L. Ed. 2d 677 (1986). Where a government official is merely negligent in causing the injury, no procedure for compensation is *constitutionally* required. *See id.* at 347, 106 S. Ct. 670. Even reckless or grossly negligent conduct by state officials falls squarely within the ambit of traditional state tort law. *See de Jesus Benavides,* 883 F.2d at 388. Accordingly, the conduct of a state actor does not violate a victim's right to substantive due process unless that conduct is carried out with deliberate indifference.

The Fifth Circuit defines "deliberate indifference" as "'a lesser form of intent' rather than a 'heightened form of negligence.'" *Lefall,* 28 F.3d at 531; *Doe v. Taylor Indep. Sch. Dist.,* 15 F.3d 443, 453 n.13 (5th Cir. 1994) (explaining that deliberate indifference involves a higher degree of certainty than gross negligence). To establish deliberate indifference, "the environment created by the state actors must be dangerous; they must know it is dangerous; and . . . they must have used their authority to create an opportunity that would not otherwise have existed for the . . . crime to occur." *Johnson,* 38 F.3d at 201. Deliberate indifference can arise from "tortious conduct exceeding mere negligence but not quite rising to the level of intentional, e.g. deliberate (or conscious) indifference, recklessness or gross negligence." *Salas,* 980 F.2d at 307. Essentially, "[t]he key to the state created danger cases . . . lies in the state actors' culpable knowledge and conduct in affirmatively placing an individual in a position of danger, effectively stripping a person of [his or] her ability

to defend [himself or] herself, or cutting off potential sources of private aid." *Johnson,* 38 F.3d at 201 (quotations and citations omitted).

In this case, Plaintiffs argue that Defendants deliberately ignored the possible dangers of Bonfire in an effort to avoid future liability. Defendants allege that they never knew or could have known that the Bonfire might collapse and therefore cannot be held liable under a deliberate indifference standard. In its Opinion in this case, the Fifth Circuit stated: "Whether deliberately delegating the construction of the bonfire stack to students the University Officials allegedly knew were not qualified to handle such a dangerous project, and whether deliberately providing no supervision to students building the bonfire even though they knew the students were not qualified to build the stack, constituted deliberate indifference presents fundamental questions of material fact." *Scanlan,* 343 F.3d at 539. Though this statement was made in an Opinion disposing of Defendants' Motion to Dismiss, the summary judgment evidence submitted since then has only muddied the waters further. At this stage in the proceedings, there remain multiple questions of fact as to whether Defendants acted with deliberate indifference. The existence of these questions prevents the Court from deciding whether Defendants did or did not act with deliberate indifference as a matter of law.

B. Was Defendants' Conduct Objectively Reasonable in Light of Clearly Established Law?

Notwithstanding the Court's conclusion that there exists a genuine issue of material fact concerning Defendants' violation of Plaintiffs' due process-based right

to be free from state-created danger, Defendants are entitled to qualified immunity if their conduct was "objectively reasonable in light of the legal rules that were clearly established at the time of [their] actions" *McClendon,* 305 F.3d at 323. As noted above, the Circuit has recognized an individual's substantive due process right to be free from state-created danger. *See Scanlan,* 343 F.3d at 538 (holding that this Court "should have concluded that the plaintiffs stated a section 1983 claim under the state-created danger theory"). By holding that Plaintiffs stated a claim upon which relief could be granted, the Circuit necessarily recognized as valid the theory of relief behind Plaintiffs' claims.[3]

Under qualified immunity analysis, the Court must determine whether the right to be free from state-created danger was clearly established under the Due Process Clause at the time of the events and activities in question. The Fifth Circuit first considered a state-created danger claim in *Salas v. Carpenter,* 980 F.2d 299 (5th Cir. 1992), a case involving a court clerk who was taken hostage and eventually killed by her estranged husband in the Tarrant County courthouse. The plaintiffs claimed that the Sheriff deprived the victim of her life by preventing the Police

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Department's SWAT and hostage negotiation teams from securing her release and by using incompetent hostage negotiators. *Id.* at 303. The Fifth Circuit held that the sheriff had not violated a constitutional right as a matter of law because, unlike the state officials in other state-created danger cases, the sheriff did not "worsen [the victim's] position and abandon her to allow events to run their course." *Id.* at 309. In *McClendon,* decided ten years after *Salas,* the en banc Fifth Circuit stated that *Salas* "did not address the viability of the state-created danger theory"; therefore, *Salas* "would not have provided a reasonable officer with 'fair warning' that creating or increasing a danger to a known victim with deliberate indifference towards that victim violates the victim's substantive due process rights." *McClendon,* 305 F.3d at 330. In other words, the Fifth Circuit's discussion of the state-created danger theory in *Salas* did not clearly establish the right to be free from state-created danger.

The Fifth Circuit recognized in *McClendon* that many circuits have read *DeShaney* to mean that the Due Process Clause imposes an affirmative duty upon state officials to protect an individual from third-party violence "if the state actor played an affirmative role in creating or exacerbating a dangerous situation that led to the individual's injury." *McClendon,* 305 F.3d at 324. The Circuit specifically noted, however, that it had not recognized the state-created danger theory. *See id.* at 325 ("[W]e have not yet determined whether a state official has a similar duty to protect individuals from state-created dangers.") (citing *Piotrowski v. City of Houston,* 237 F.3d 567, 584 (5th Cir. 2001) ("*Piotrowski II*"); *Randolph,* 130 F.3d at 731). In the *McClendon* court's assessment, the Fifth Circuit's reluctance to endorse the state-created danger theory in the

period since *Salas* suggested that "a reasonable officer in this Circuit would, even today, be unclear as to whether there is a right to be free from 'state-created danger.'" *Id.* at 332 n.12; *cf. Rivera,* 349 F.3d at 249 ("We have never recognized state-created danger as a trigger of State affirmative duties under the Due Process clause. We again decline to do [so].") (citation and footnote omitted). *McClendon* highlights the significance of the Fifth Circuit's treatment of this question. The Circuit has not merely declined to recognize the state-created danger theory of substantive due process; it has scrupulously avoided it for more than ten years. The Fifth Circuit's reluctance to adopt the state-created danger theory is therefore not a mere neutral factor to be considered against the general consensus among other circuits, but a warning that the Fifth Circuit might not join that consensus.[4]

The Court therefore concludes that the state-created danger theory of substantive due process was not clearly established at the time of Defendants' Bonfire-related activities. Because Plaintiffs' theory had not been adopted as a viable avenue to a substantive due process claim, a reasonable school official would not have been aware that the Fourteenth Amendment's Due Process Clause provided a constitutional right to be free from state-created danger, much less that an injury caused by a school administrator's failure to exercise control over an activity such as

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[4] As the *McClendon* Court put it, "a strong consensus of authorities in other circuits is more likely to be determinative on a subject when this circuit is *tabula rasa* on that subject than when the landscape in this circuit is littered with opinions expressing varying levels of skepticism." *McClendon,* 305 F.3d at 332 n.12.

Bonfire would violate that right. Accordingly, Defendants are entitled to qualified immunity from Plaintiffs' § 1983 claims.

IV. Conclusion

For the reasons articulated above, Defendants' Renewed Motion for Summary Judgment is hereby **GRANTED**. All claims against the University Officials are **DISMISSED WITH PREJUDICE.** All Parties are to bear their own taxable costs, expenses, and attorneys' fees incurred herein to date. A Final Judgment will be issued concurrently with this Order.

IT IS SO ORDERED.

DONE this 21st day of May, 2004, at Galveston, Texas

/s/ Samuel B. Kent
SAMUEL B. KENT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

JOHN ANDREW COMSTOCK and DIXIE ANN ZINNEKER Plaintiffs, v. TEXAS A&M UNIVERSITY *et al.* Defendants.	§ § § § § § §	CIVIL ACTION NO. G-01-730

FINAL JUDGMENT

(Filed Jul. 23, 2002)

Pursuant to the Court's Order Dismissing Plaintiffs' Federal Law Claims with Prejudice and Dismissing Plaintiffs' State Law Claims without Prejudice, each and all federal law claims brought by Plaintiffs against Texas A&M University and the individuals employed by the University are hereby **DISMISSED WITH PREJUDICE**. Pursuant to that same Order, each and all state law claims brought by Plaintiffs against the individuals employed by the University and the remaining Defendants are hereby **DISMISSED WITHOUT PREJUDICE**. All relief not herein provided is expressly **DENIED**. All Parties are **ORDERED** to bear their own costs and attorney's fees incurred herein to date. **THIS IS A FINAL JUDGMENT**.

IT IS SO ORDERED.

DONE this 23rd day of July, 2002, at Galveston, Texas.

/s/ Samuel B. Kent
SAMUEL B. KENT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

JOHN ANDREW COMSTOCK and DIXIE ANN ZINNEKER Plaintiffs,	§	CIVIL ACTION NO. G-01-730
v.	§	
TEXAS A&M UNIVERSITY *et al.* Defendants.	§	

ORDER DISMISSING PLAINTIFFS' FEDERAL LAW CLAIMS WITH PREJUDICE AND DISMISSING PLAINTIFFS' STATE LAW CLAIMS WITHOUT PREJUDICE

(Filed Jul. 23, 2002)

The Texas A&M Bonfire ("Bonfire") tragically collapsed in the early hours of November 18, 1999, killing twelve students and injuring an additional twenty-seven. This action is one of six virtually identical lawsuits[1] now

[1] The Court is issuing this Order in all six lawsuits, which are styled as *Breen v. Tex. A&M Univ., et al.*, No. G-01-CV-670 (S.D. Tex. filed Oct. 24, 2001); *Comstock v. Tex. A&M Univ., et al.*, No. G-01-CV-730 (S.D. Tex. filed Nov. 19, 2001); *Davis v. Tex. A&M Univ., et al.*, No. G-01-CV-720 (S.D. Tex. filed Nov. 16, 2001); *Kimmel v. Tex. A&M Univ., et al.*, No. G-01-CV-719 (S.D. Tex. filed Nov. 16, 2001); *Scanlan v. Tex. A&M Univ., et al.*, No. G-01-CV-733 (S.D. Tex. filed Nov. 19, 2001); and *Self, et al. v. Tex. A&M Univ., et al.*, No. G-01-CV-721 (S.D. Tex. filed Nov. 16, 2001). The Plaintiffs are, in *Breen*, the brother/administrator and parents of Christopher Breen, a former student killed in the collapse; in *Comstock*, John Andrew Comstock, the most severely injured surviving victim of the collapse, and his mother; in *Davis*, Bill Davis, one of the students injured in the collapse; in *Kimmel*, the estate and parents of Lucas Kimmel, one of the students killed in the collapse; in *Scanlan*, Lauren Scanlan, one of the students

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pending before the Court wherein the Plaintiffs allege that Texas A&M University ("the University") and various former and present high-level University employees[2] ("University Officials") violated 42 U.S.C. § 1983 when they deprived the Bonfire victims of their Fourteenth Amendment right to substantive due process by acting with deliberate indifference to the state created danger that killed or injured them. Plaintiffs further allege that Defendants negligently harmed the victims in violation of Texas state law.[3] On May 24, 2002, Defendants filed a Motion for Summary Judgment wherein they assert that they are immune from liability with respect to Plaintiffs'

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injured in the collapse, and her parents; and in *Self*, the mother/administrator of Jerry Don Self (student killed), the mother/administrator and father of Bryan McClain (student killed); the father/administrator and mother of Christopher Lee Heard (student killed), the father/administrator and mother of Chad Powell (student killed), Matthew Robbins (student injured), Dominic Braus (student injuried) and his mother. In all, these six suits represent eleven (six killed, five injured) of the thirty-nine total victims of the Bonfire collapse.

[2] The University Officials include: Russell Thompson; Dr. J. Malon Southerland; Dr. William Kibler; Dr. John J Koldus, III; Dr. Ray M. Bowen; Dr. Kevin Jackson; Dr. Zack Coapland; Maj. Gen. M.T. Hopgood; Brig. Gen. Don Johnson; Maj. Rebecca Ray; Jim Reynolds; Robert Harry Stiteler; and Michael Krenz. Only Thompson, Bowen and Southerland are named as Defendants in all six suits. The remaining individuals are named as Defendants in *Self* only, or *Self* and *Comstock*. The Court will hereinafter refer to the University and the University Officials together as "Defendants."

[3] The *Self* and *Comstock* Plaintiffs have also asserted state law claims against a number of Defendants who, although intimately involved with the University, were not employed by the University at the time of the Bonfire collapse. The analysis in Part II and Part III of this Order pertains only to the merits of Plaintiffs' claims against the University and the University Officials; and in no way comments upon the validity of any Bonfire-related claim, filed by any Plaintiff, against any non-state actor Defendant.

federal and state law claims and alternatively, that Plaintiffs have failed to state a viable cause of action upon which relief can be granted.[4] After very carefully and thoughtfully considering Defendants' well-prepared Motion, Plaintiffs' insightful Responses thereto, the lengthy record in this matter and the applicable law, the Court concludes that Defendants' Motion for Summary Judgment must be **GRANTED IN PART** with respect to Plaintiffs' federal law claims. For reasons set forth below, the Court need not reach the merits of Defendants' Motion for Summary Judgment with respect to Plaintiffs' allegations of negligence, as the Court respectfully declines to exercise supplemental jurisdiction over Plaintiffs' state law claims.[5]

I.

The following facts are primarily derived from the Final Report of the Special Commission on the 1999 Texas A&M Bonfire ("Final Report"). At this stage of the proceedings, the Parties have accepted the Final Report – the product of hundreds of hours of investigation and expert analysis – as an authoritative account of the history of Bonfire, the mechanics of the 1999 collapse and the factors that contributed to this far-reaching tragedy. The Court likewise adopts the Final Report as a definitive narrative of the relevant facts for purposes of its instant analysis.

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[4] Defendants' Motion for Summary Judgment incorporates the legal arguments and authorities contained within their Rule 12(b)(6) Motion to Dismiss, filed December 19, 2001.

[5] Several of the Plaintiffs are not asserting state law claims in the instant lawsuits, as they have already filed such claims in various state courts. Part IV of this Order, which pertains to the Court's supplemental jurisdiction, is therefore inapplicable to those Plaintiffs.

However, because the Court wishes to provide as comprehensive of a factual summary as possible, the following account also includes several facts gleaned from the summary judgment evidence.

The much loved and revered Texas A&M Bonfire tradition began humbly, with a burning trash heap in 1909. Over the ensuing ninety years, Bonfire grew into one of the most cherished traditions of Texas A&M University, uniting students, administrators, alumni and the surrounding community each September, October and November. The process of cutting trees into logs, stacking the logs into a towering structure and preparing to ceremoniously burn the edifice on the eve of Texas A&M's annual football game with the University of Texas occupied over five thousand students for an estimated 125,000 hours each fall. At the culmination of these efforts, an estimated forty to eighty thousand individuals gathered annually to watch Bonfire ignite and burn. The University's students, or "Aggies," believe that Bonfire symbolizes their burning desire to "beat the hell out of t.u" at the next day's football game. It is symbolic not only of one school deeply rooted in tradition, but is representative of the entire Nation's passionate fascination with the most venerated aspects of collegiate football.

Bonfire may have started out as a pile of wood and trash, but by 1999, it had evolved into a massive structure with measurable technical complexity. The initial switch from trash to logs took place in the 1940s, when the students introduced a center pole and a teepee-shaped design. Because a teepee-shaped structure can only reach as high as its tallest log, the students began building Bonfire with multiple layers of logs in the 1960s. The 1968 and 1969 Bonfires utilized this multi-tier design, with the

1969 Bonfire reaching 109 feet – the tallest Bonfire ever recorded. In the late 1970s, Bonfire began to take on a wedding cake-shaped design, with multiple cylindrical layers stacked one on top of the other. Since the 1980s, all Bonfires have been (1) built in the wedding cake design; (2) sixty to eighty feet tall; (3) six tiers bound with wire; (4) built around a two-part spliced center pole; and (5) surrounded by four perimeter poles with guy ropes. A completed 1990s Bonfire likely weighed over two million pounds. No other institution of higher learning in the world lays claim to a blazing bonfire of such monumental proportions, and it is an instantly recognizable source of pride and "fighting spirit" to past, present and future Aggies around the globe.

Even in light of Bonfire's massive proportions, its design and construction always remained almost the exclusive purview of the students. The "Redpots," student leaders between the ages of 19 and 21, controlled the Bonfire build year after year. The Repots were not licensed engineers or architects, lacked formalized construction training and were not required to attend classes on architectural design or building techniques. Moreover, Redpots possessed less than two months experience as "Junior Redpots" before being promoted to Redpots as seniors, failed to utilize blueprints and relied on building techniques that were passed down orally from their student predecessors. Yet Defendants entrusted the Redpots with the primary responsibility for erecting the enormous Bonfire each fall.

Defendants undoubtably recognized the dangers of Bonfire. In fact, one University document noted that "[i]t is a well-established fact that Bonfire constitutes by far the single most liability laden student activity on campus."

Other University documents warned that "Bonfire is, by its vary nature, a hazardous activity"; "Bonfire involves thousands of students engaged in a variety of activities, some of which involve potential risks and liability and therefore supervision is paramount"; and "[a]s we all are aware, Bonfire is a very risky undertaking from a safety and liability perspective." Blaine Lewis, a Junior Redpot, wrote in a 1997 paper that stacking the Bonfire's logs "has the potential for great tragedy at any time." Against this backdrop, the University purchased a two million dollar general liability insurance policy to insure against a catastrophic disaster on campus.

Nevertheless, very few truly significant restrictions were ever imposed, communicated or uniformly enforced to protect the safety of Bonfire participants. However, Defendants did not ignore Bonfire safety altogether. Faculty and staff frequently visited the Bonfire site for observation purposes. Defendants created the faculty post of "Bonfire Advisor," implemented a policy that restricted access to the Bonfire site during construction and intermittently passed other safety measures in response to particular "trigger" events. For instance, Defendants (1) imposed a fifty-five foot height restriction on Bonfire in response to fire hazard complaints; (2) required Bonfire participants to attend tree-cutting training programs after they received reports of cut-site accidents; (3) appointed an alcohol awareness committee and organized the "Don't Shatter the Tradition" campaign to combat excessive Bonfire-related drinking; and (4) prohibited students from riding in the back of pick-up trucks after a motor vehicle fatality. The Final Report characterizes this conduct as a "reactive risk management model" and explains that Defendants only implemented very specific remedial measure in response

to specific triggers. Apparently, no specific events or incidents triggered Defendants to query whether Bonfire was structurally unsound prior to 1999. Consequently, they never inquired into Bonfire's structural integrity; and therefore neglected to reexamine Bonfire's design prior to the collapse.

It can be reasonably argued that Defendants *should* have undertaken a study of Bonfire's structural soundness in 1994. That year, the partly constructed edifice suffered a partial collapse (or "lean") that should have alerted the State Defendants of Bonfire's instability. However, the 1994 mishap was attributed by those involved to wet and unstable ground, not structural integrity. In fact, those involved praised the structural integrity of the 1994 Bonfire because heavy equipment was needed to pull the stack apart. Consequently, the mishap failed to trigger a design re-examination. According to the Final Report, the "people obviously concerned with Bonfire safety, did in fact misinterpret these events and missed clear warning signs about structural integrity. This tunnel vision in decision [was] due . . . to a cultural bias in which legitimate courses of action outside past experience or contrary to the University's pre-disposition are often not considered. . . . More objective interpretations or more conservative interpretations, which might have led to a structural reassessment, could reasonably have been considered."

Regrettably, because of Defendants' reluctance to depart from or question "the way its always been," no one viewed the 1999 Bonfire as a potentially hazardous towering structure tenuously held together with wire. More significantly, no one proposed a sweeping reassessment of Bonfire's construction process. And the results were catastrophic and heartbreaking. The 1999 Bonfire

collapsed prior to completion, killing twelve students and injuring twenty-seven others, resulting in an enormous groundswell of grief and remorse which continues to reverberate to the deepest recesses of the worldwide Aggie community.

The Final Report characterizes the physical mechanics of the collapse as a "containment failure" in the first tier of logs, primarily caused by (1) excessive internal stresses driven primarily by aggressive wedging of second tier logs into the first tier; and (2) inadequate containment strength caused by insufficient binding support in the wiring used to tie the logs together. Moreover, the first stack of the 1999 Bonfire was not wrapped with steel cables, further reducing containment strength. Steel cables had been wrapped around the first tier as a matter of course for several years prior to 1999. The Final Report also identifies the overarching factors that brought about the physical collapse: the absence of a proactive risk management model; the University community's cultural bias impeding risk identification; the lack of student leadership knowledge and skills pertaining to structural integrity; and the lack of formal, written Bonfire design plans or construction methodology. Together, these factors created an environment wherein students were permitted to construct a complex and dangerous structure without adequate engineering supervision or physical safety controls and led to a complex organizational failure. The Bonfire collapse was not caused by a specific event, error or omission in 1999, but, rather, by decisions and actions taken by both students and University officials over many, many years.

II.

The Court will initially consider Plaintiffs' § 1983 claims against the University, before turning to Plaintiffs' claims against the University Officials. In their Motion for Summary Judgment, Defendants maintain that the University is entitled to summary judgment in its favor on the basis of Eleventh Amendment immunity. The Court agrees.

The University is a state-funded state institution of higher education. *See* Tex. Educ. Code § 86.02 (signifying that Texas A&M University was created by the laws of the State of Texas). Consequently, Plaintiffs are barred from bringing this suit against the University unless they are able to overcome the State's jurisdictional immunity in federal court, commonly referred to as "Eleventh Amendment" immunity.[6] *See Quern v. Jordan,* 440 U.S. 332, 341, 99 S. Ct. 1139, 1145, 59 L.Ed.2d 358 (1979). Eleventh Amendment immunity prohibits actions against a state entity in federal court, unless either the state has waived its sovereign immunity or Congress, pursuant to another provision in the Constitution, has expressly abrogated the state's immunity. *See Will v. Mich. Dept. of State Police,* 491 U.S. 58, 66, 109 S. Ct. 2304, 2309-10, 105 L.Ed.2d 45 (1989); *Welch v. Tex. Dept. of Highways and Pub. Transp.,* 483 U.S. 468, 473-74, 107 S. Ct. 2941, 2946, 97 L.Ed.2d 389 (1987). A state's intention to waive its sovereign

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[6] The Court notes that "Eleventh Amendment" immunity is not actually derived from the Eleventh Amendment to the Constitution. *See Alden v. Maine,* 527 U.S. 706, 713, 199 S.Ct. 2240, 2246, 144 L.Ed.2d 636 (1999) (explaining that the phrase "Eleventh Amendment immunity" is "convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment.").

immunity must be "unequivocally expressed." *Stem v. Ahearn,* 908 F.2d 1, 4 (5th Cir. 1990) (citing *Port Authority Trans-Hudson Corp. v. Feeney,* 495 U.S. 299, 305-06, 100 S.Ct. 1868, 1873, 109 L.Ed.2d 264 (1990)). Significantly, Texas has not consented to be sued in federal court by individuals regarding the 1999 Bonfire collapse, nor has state sovereign immunity been abrogated or compromised by Congress with the passage of § 1983. The Supreme Court has held, in fact, that states are not "persons" subject to suit within § 1983's scope. *See Arizonans for Official English v. Ariz.,* 520 U.S. 43, 69, 117 S. Ct. 1055, 1069, 137 L.Ed.2d 170 (1997) (citing *Will,* 491 U.S. at 71, 109 S. Ct. at 2312); *see also Cronen v. Tex. Dept. of Human Servs.,* 977 F.2d 934, 936 (5th Cir. 1992); *Stem,* 908 F.2d at 4. Accordingly, the Court finds that the University is shielded from liability in this matter by its Eleventh Amendment immunity, as a matter of law.[7] Consequently, Defendants' Motion for Summary Judgment is hereby **GRANTED** with respect to Plaintiffs' federal law claims

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[7] Previous decisions of the Fifth Circuit and District Courts within the Southern District of Texas have consistently afforded Eleventh Amendment immunity to state universities, including Texas A&M. *See, e.g., Tex. ex rel. Bd. of Regents of Univ. of Tex. Sys. v. Walker,* 142 F.3d 813, 820 n. 10 (5th Cir. 1998) (citing *Regents of Univ. of Cal. v. Doe,* 519 U.S. 425, 429-31, 117 S. Ct. 900, 903-04, 137 L.Ed.2d 55 (1997) and *United Carolina Bank v. Bd. of Regents of Stephen F. Austin State Univ.,* 665 F.2d 553, 556-61 (5th Cir. 1981)); *Mangaroo v. Nelson,* 864 F.2d 1202, 1204 (5th Cir. 1989); *Gay Student Servs. v. Tex. A&M Univ.,* 737 F.2d 1317, 1333-334 (5th Cir. 1984); *Lowery v. Univ. of Houston-Clear Lake,* 82 F. Supp.2d 689, 693 (S.D. Tex. 2000); *Chacko v. Tex. A&M Univ.,* 960 F. Supp. 1180, 1197-198 (S.D. Tex. 1997); *Baldwin v. Univ. of Tex. Med. Branch at Galveston,* 954 F. Supp. 1022, 1030 (S.D. Tex. 1996); *Idoux v. Lamar Univ. Sys.,* 817 F. Supp. 637, 639-640 (E.D. Tex. 1993); *Zentgraf v. Tex. A&M Univ.,* 492 F. Supp. 265, 271-72 (S.D. Tex. 1980).

against the University and each and all of those claims are hereby **DISMISSED WITH PREJUDICE.**

III.

Plaintiffs also allege that the University Officials are liable for the harm that befell the Bonfire victims pursuant to § 1983.[8] In response, Defendants contend that Plaintiffs' § 1983 claim against the University Officials must be dismissed pursuant to Fed. R. Civ. P. 12(b)(6), or, alternatively, on qualified immunity grounds. The Court need not reach the qualified immunity issue, however, because Defendants correctly assert that a Rule 12(b)(6) dismissal is warranted.

Legal Standard for Rule 12(b)(6) Dismissal

The Federal Rules of Civil Procedure authorize a court, upon suitable showing, to dismiss any action or any claim within an action for failure to state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6). Put another way, Rule 12(b)(6) dismissal is appropriate when the "the plaintiff would not be entitled to relief under any set of facts or any possible theory that he could prove consistent with the allegations in his complaint." *Jones v. Greninger,* 188 F.3d 322, 324 (5th Cir. 1999); *see also* Fed. R. Civ. P. 12(b)(6). When making this determination, the Court accepts as true all well-pleaded allegations in the complaint, and views them in a light most favorable to the plaintiff. *See Malina v. Gonzales,* 994 F.2d 1121,

[8] Plaintiffs have sued the University Officials in their individual capacities only.

1125 (5th Cir. 1993). A plaintiff must plead specific facts in order to avoid dismissal for failure to state a claim and consequently, the Court will not accept conclusory allegations or unwarranted deductions of fact contained within the plaintiff's complaint as true. *See Tuchman v. DSC Communications Corp.,* 14 F.3d 1061, 1067 (5th Cir. 1994). Unlike a Motion for Summary Judgment, a Motion to Dismiss should be granted only when it appears without a doubt that the plaintiff can prove no set of facts in support of his claims that would entitle him to relief. *See Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L.Ed.2d 80 (1957).

In considering a motion to dismiss for failure to state a claim, a district court must limit itself to the contents of the pleadings, including attachments thereto. *See* Fed. R. Civ. P. 12(b)(6). However, "[d]ocuments that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to [the plaintiff's] claims." *Collins v. Morgan Stanley Dean Whitter,* 224 F.3d 496, 498-99 (5th Cir. 2000) (citing *Venture Assoc. Corp. v. Zenith Data Sys. Corp.,* 987 F.2d 429, 431 (7th Cir. 1993)); *see also Chambers v. Time Warner, Inc.,* 282 F.3d 147, 153 (2d Cir. 2002); *Branch v. Tunnell,* 14 F.3d 449, 453-54 (9th Cir. 1994); *In re Securities Litigation BMC Software, Inc.,* 183 F. Supp. 2d 860, 883 (S.D. Tex. 2001); *Franks v. Prudential Health Care Plan, Inc.,* 164 F. Supp.2d 865, 872 (S.D. Tex. 2001). By attaching documents that are integral to the plaintiff's claims, "the defendant merely assists the plaintiff in establishing the basis of the suit, and the court in making the elementary determination of whether a claim has been stated." *Collins,* 224 F.3d at 499. In these cases, the Complaints on file repeatedly refer to the Final

Report; and Plaintiffs' allegations are clearly based upon the findings contained therein. Accordingly, in reviewing Plaintiffs' federal claims under Rule 12(b)(6), the Court will equally consider the Plaintiffs' well-pleaded allegations and the facts set out in the Final Report.

42 U.S.C. § 1983

Section 1983 provides a cause of action against "[e]very person who, under color of any statute . . . of any State . . . subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws. . . ." 42 U.S.C. § 1983; *see also Moore v. Willis Indep. Sch. Dist.*, 233 F.3d 871, 874 (5th Cir. 2000) (citing *Leffall v. Dallas Indep. Sch. Dist.*, 28 F.3d 521, 525 (5th Cir. 1994)). "Rather than creating substantive rights, § 1983 simply provides a remedy for the rights that it designates." *Johnston v. Harris County Flood Control Dist.*, 869 F.2d 1565, 1573 (5th Cir. 1989). The assertion of an underlying constitutional or statutory violation is therefore a predicate to liability under § 1983. *See id.* In their attempt to establish federal liability against the University Officials, Plaintiffs premise their § 1983 claims upon an alleged substantive due process violation, arising from the "state created danger" theory.[9]

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[9] Defendants initially argue that Plaintiffs' § 1983 claims must be dismissed because the state created danger theory was not well-settled law in this Circuit at the time of the Bonfire collapse. The Court rejects this argument, however because the Fifth Circuit's recent decision in *McClendon v. City of Columbia*, 258 F.3d 432 (5th Cir. 2001), explains that the state created danger theory was the law in this Circuit well-before 1999. *See id.* at 441 ("We conclude that . . . [on July 12, 1993] it

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State Created Danger Theory

In general, state governments are under no affirmative duty to provide protective services: "[T]he Due Process Clause generally confers no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty or property interests of which the government itself may not deprive the individual ... [Thus,] a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 196-97, 109 S. Ct. 998, 1003-04, 103 L.Ed.2d 249 (1989); *see also McClendon v. City of Columbia,* 258 F.3d 432, 436 (5th Cir. 2001); *Walton v. Alexander,* 44 F.3d 1297, 1302 (5th Cir. 1995) (*en banc*). Rather, the Constitution imposes a duty on the state to protect particular individuals only in "certain limited circumstances." *DeShaney,* 489 U.S. at 198, 109 S. Ct. at 1004. The Fifth Circuit has recognized two such limited scenario, namely, when the state has a special relationship with the person or when the state exposes a person to a danger of its own creation, or a "state created danger." *See McClendon,* 258 F.3d at 436. Plaintiffs do not argue that the University Officials had a special relationship with the

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was clearly established that a state actor creating a danger, knowing of that danger, and using his authority to create an opportunity for a third person to commit a crime that otherwise might not have existed, was subject to liability for a violation of the victim's rights."). The fact that the Fifth Circuit recently agreed to rehear *McClendon en banc* does not change the Court's conclusion. *McClendon* is the best authority currently available on this issue and the Court sees no reason to depart from its reasoning. On the assumption that this ruling will be appealed, the Parties are of course free to seek reassessment of the present state of the law. But any modification thereof is a policy consideration best left to the Fifth Circuit.

Bonfire victims, rather, they allege that the University Officials violated the Due Process Clause by failing to protect the victims from a state created danger.

The Fifth Circuit set out the two basic requirements of the state created danger theory in *Piotrowski v. City of Houston,* 51 F.3d 512 (5th Cir. 1995). A plaintiff asserting such a claim must show the (1) the state actors increased the danger to him or her; and (2) the state actors acted with deliberate indifference. *See id.* at 515; *see also McClendon,* 258 F.3d at 437; *Doe v. Hillsboro Indep. Sch. Dist.,* 113 F.3d 1412, 1415 (5th Cir. 1997); *Johnson v. Dallas Indep. Sch. Dist.,* 38 F.3d 198, 201 (5th Cir. 1994). Plaintiffs allege that the University Officials created a danger by failing to ensure the Bonfire's structural integrity. The facts surrounding the Bonfire collapse clearly tend to suggest that the conduct of the University Officials may have contributed, at least in part, to the 1999 Bonfire collapse. But *even if* the University Officials created an environment that was dangerous to the Bonfire victims (and the Court is expressly not now so finding), it is quite clear that they did not do so with "deliberate indifference" – the requisite culpability to make out a constitutional violation.[10]

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[10] Furthermore, *even if* the University Officials did create an environment that was dangerous to the Bonfire victims, that fact appears to be insufficient to satisfy the first requirement for the state created danger theory. The Final Report concluded that the students who were building the 1999 Bonfire (a group which includes the students who were killed and/or harmed) also played a role in the harm that befell them. None of the Fifth Circuit cases recognizing the state created danger doctrine have involved an incident for which the victims were partially at fault. Rather, the relevant cases have only recognized state created dangers where state actors created situations that increased the risk of danger from *third parties* to specific individuals.

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Deliberate Indifference

There is a significant distinction between a tort and a *constitutional* wrong. *Leffall,* 28 F.3d at 532 (citing *de Jesus Benavides v. Santos,* 883 F.2d 385, 388 (5th Cir. 1989)). The Supreme Court has made it clear that "[t]he Due Process Clause of the Fourteenth Amendment is not implicated by the lack of due care of an official causing unintended injury to life, liberty or property." *Davidson v. Canon,* 474 U.S. 344, 347, 106 S. Ct. 668, 670, 88 L.Ed.2d 677 (1986). Rather, reckless or grossly negligent conduct by state officials falls squarely within the ambit of traditional state tort law. *See de Jesus Benavides,* 883 F.2d at 388. Simply put, where a government official is merely negligent in causing the injury, no procedure for compensation is *constitutionally* required. *See Davidson,* 474 U.S. at 347, 106 S. Ct. at 670. Accordingly, the conduct of a state actor fails to violate a victim's right to substantive due process unless that conduct is carried out with deliberate indifference.

The Fifth Circuit defines "deliberate indifference" as "'a lesser form of intent' rather than a 'heightened form of negligence." *Leffall,* 28 F.3d at 531; *Doe v. Taylor Indep. Sch. Dist.,* 15 F.3d 443, 453 n13 (5th Cir. 1994) (explaining that deliberate indifference involves a higher degree of certainty than gross negligence). To establish deliberate indifference, "the environment created by the state actors must be dangerous; they must know it is dangerous; and . . . they must have used their authority to create an opportunity that would not otherwise have existed for the

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See, e.g. McClendon, 258 F.3d at 432; *Piotrowski v. City of Houston,* 51 F.3d at 512; *Johnson,* 38 F.3d at 198. On this basis alone, the state created danger theory is legally inapplicable here.

. . . crime to occur." *Johnson,* 38 F.3d at 201. Deliberate indifference can arise from "tortious conduct exceeding mere negligence but not quite rising to the level of intentional, e.g. deliberate (or conscious) indifference, recklessness or gross negligence." *Salas v. Carpenter,* 980 F.2d 299, 307 (5th Cir. 1992). Essentially, "[t]he key to the state created danger cases . . . lies in the state actors' culpable knowledge and conduct in affirmatively placing an individual in a position of danger, effectively stripping a person of [his or] her ability to defend [himself or] herself, or cutting off potential sources of private aid." *Johnson,* 38 F.3d at 201 (quotations and citations omitted).

In *Johnson,* the Fifth Circuit noted that *Wood v. Ostrander,* 879 F.2d 583 (9th Cir. 1989), exemplifies the state created danger theory of liability. In that case, a police officer arrested a drunken driver and impounded his car, leaving the driver's female passenger alone at night, without any means of getting home, in an area notorious for criminal activity. She was subsequently raped by a stranger who offered her a ride. *See id.* at 586. Other cases applying the state created danger theory are to a similar effect. *See, e.g. Dwares v. City of New York,* 985 F.2d 94, 99 (2d Cir. 1993) (holding that it would violate due process for police officers to conspire with and sanction violence by "skinheads" against persons burning American flags); *L.W. v. Grubbs,* 974 F.2d 119, 121-22 (9th Cir. 1992) (holding that § 1983 plaintiff had stated a claim by alleging that she was a nurse employed by the state, that her supervisors had instructed her to work alone with a known sex offender after leading her to believe that she would not be made to work under such conditions and that she had been assaulted by the sex offender while alone with him); *Freeman v. Ferguson,* 911 F.2d 52 (8th Cir. 1980) (finding a

viable § 1983 claim where a woman was killed by her estranged husband after the chief of police had directed his officers to ignore her pleas that they stop the husband, who was the police chief's friend, from threatening and intimidating her); *White v. Rochford,* 592 F.2d 381, 382-83 (7th Cir. 1979) (finding that two small children stated a § 1983 claim by alleging that police officers arrested their uncle and left them unattended in a car on the side of the freeway). In light of these authorities, the Court emphasizes that deliberate indifference arises in cases involving conduct that is substantially more abhorrent, and significantly more detestable, than even gross negligence.

The conduct of the University Officials does not rise to such a level, as a matter of law. As demonstrated by the Final Report, there is *no* evidence that the University Officials were aware of the impending Bonfire collapse. To the contrary, the Final Report concluded that "[n]o one in the [University's] administration ever interpreted ongoing behavioral problems as indications that safe Bonfire design and construction was beyond the capabilities of student leaders." Nor do the facts suggest that the University Officials directly prevented increased Bonfire safety or opposed a review of Bonfire's structural integrity. They simply failed to recognize that change was desperately needed. They built Bonfire the way that it had always been built and the way that it had always succeeded. For them, Bonfire was, and is, an institution. And, as stated in the Final Report, "leaders do not change institutions unless there is a clearly perceived need to do so."

The record presently before the Court amply demonstrates that the University Officials were aware of the dangers posed by Bonfire. Consequently, it can be persuasively argued that they may have acted negligently,

possibly even grossly so, and that the Bonfire collapse could have been prevented had cautionary measures been implemented. However, despite their knowledge of Bonfire's extremely risky nature and their failure to proactively avert or reduce those risks, the evidence equally shows that the University Officials were unaware of the *precise* risk at hand – the risk that the entire Bonfire would come tumbling down. Rather, the University Officials believed that nine y years of successful Bonfire building experience was enough in itself to ensure that the tradition would safely continue. Although the University Officials' lack of awareness might appear naive, and possibly even foolish, in retrospect, it cannot support a finding of deliberate indifference. This is not a case in which state actors "brought the victim into close proximity with a specific individual known to be likely to commit violence, . . . or abandoned the victim in a highly dangerous environment, . . . or conspired with [a] private actor who inflicted the deprivation." *Leffall*, 28 F.3d at 531. Plaintiffs concede that the University Officials took *some* measures to ensue Bonfire safety (i.e. height restriction, appointment of a Bonfire advisor, tree-cutting training program, alcohol awareness committee, prohibition against riding in the back of pick-up trucks). Simply put, because the University Officials were indeed concerned with Bonfire Safety (albeit, in hindsight, not concerned enough, or in precisely the right way), the Court cannot conclude that their conduct rose to the egregious level of a constitutional violation, as a matter of law.[11] *See id.* at

[11] The Court acknowledges that the existence of deliberate indifference is often a factual determination. However, because the Final Report affirmatively discloses that the University Officials in this case lacked the requisite culpability with respect to the alleged

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531-32 (concluding that even if school officials' decision to sponsor dance at high school, despite awareness of dangers posed thereby, was negligent, such conduct did not rise to the level of deliberate indifference to the rights of a student who was killed by random gunfire in the school parking lot after the dance); *Doe,* 15 F.3d at 456 n. 12 (observing that "good faith but ineffective responses" by state actors tend to defeat claims of deliberate indifference). In reaching this conclusion, the Court in no way condones the reactive risk management policy of the University Officials or their cultural bias against departing from tradition in favor of newer safer measures. Rather, the Court recognizes the distinction between state law torts and constitutional wrongs. Expanding the substantive due process clause to encompass the allegations at issue here would violate well-settled principles of constitutional law and expand the protections of the Fourteenth Amendment beyond their appointed boundaries. Therefore, because Plaintiffs fail to allege, and cannot allege, a cognizable substantive due process violation, as a matter of law, Plaintiffs' § 1983 claims against the University Officials warrant dismissal pursuant to Fed. R. Civ. P. 12(b)(6). Defendants' Motion for Summary Judgment is therefore **GRANTED** with respect to Plaintiffs' federal law claims against the University Officials and each and all of such claims are hereby **DISMISSED WITH PREJUDICE**.

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violation of the Bonfire victims' constitutional rights, it is not only appropriate, but mandatory in this instance to conclude that the University Officials failed to act with deliberate indifference, as a matter of law.

IV.

Having dismissed all of Plaintiffs' federal law claims, the Court is now faced with six negligence lawsuits governed purely by state tort law. Thus, the Court must decide whether to retain supplemental jurisdiction over Plaintiffs' remaining claims. In evaluating this matter, the Court is guided by the supplemental jurisdiction statute, 28 U.S.C. § 1367. Section (a) of that statute provides that "in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to the claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). Section (c) of the statute refines the supplemental jurisdiction doctrine by enumerating four circumstances in which District Courts have discretion to decline supplemental jurisdiction over state law claims: (1) when the state law claims raise novel or complex issues of state law; (2) when the state law claims substantially predominate over the claims within the district court's original jurisdiction; (3) when the district court dismisses the claims over which it has original jurisdiction; and (4) in exceptional circumstances, if there are other compelling reasons for declining jurisdiction. 28 U.S.C. § 1367(c). In this case, the third factor enumerated in § 1367(c) is clearly present, and to only a slightly lesser extent, the second and fourth factors as well. The Court has dismissed all of the claims that were within the Court's original jurisdiction and only Plaintiffs' state law claims remain. And those claims are manifestly better suited for resolution by a state court, applying squarely applicable state law, in front of a jury of state citizens. Accordingly, the

Court respectfully declines to exercise its supplemental jurisdiction over Plaintiffs' state law claims. *See Noble v. White,* 996 F.2d 385, 395 (5th Cir. 1993) ("District courts enjoy wide discretion in determining whether to retain supplemental jurisdiction over a state law claim once all federal claims are dismissed"); *Rhyne v. Henderson,* 973 F.2d 386, 395 (5th Cir. 1992) ("The district court has properly dismissed all of the federal questions that gave it original jurisdiction in this case. Therefore, we find that the district court's dismissal of the state law claims was proper under 28 U.S.C. § 1367(c)"); *see also United Mine Workers of Am. v. Gibbs,* 383 U.S. 715, 726, 86 S. Ct. 1130, 1139, 16 L.Ed.2d 218 (1966) ("Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of the applicable law."). As such, Plaintiffs' state law claims are hereby **DISMISSED WITHOUT PREJUDICE**. Plaintiffs are free to re-file their state law claims against Defendants in state court, if they so desire, either by filing new actions or by seeking leave to intervene in the state cases that are already well underway. In doing so, Plaintiffs are of course subject to the applicable limitations requirements.[12] All Parties are to bear their own taxable costs, expenses and attorneys' fees incurred herein to date; and all other pending Motions, filed by any of the Parties to this litigation, are hereby **DENIED** as moot.

IT IS SO ORDERED.

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[12] For the same reasons, the Court also declines to exercise supplemental jurisdiction over the *Self* and *Comstock* Plaintiffs' state law claims against the non-state actor Defendants. Thus, those claims are likewise **DISMISSED WITHOUT PREJUDICE**, rather to proceed in either new or extant state court litigation, as appropriate.

DONE this 23rd day of July, 2002, at Galveston, Texas.

/s/ Samuel B. Kent
SAMUEL B. KENT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

JACQUELYNN KAY SELF *et al.*	§	
Plaintiffs,	§	
	§	CIVIL ACTION
v.	§	NO. G-01-721
TEXAS A&M UNIVERSITY *et al.*	§	
Defendants.	§	

FINAL JUDGMENT

(Filed Jul. 23, 2002)

Pursuant to the Court's Order Dismissing Plaintiffs' Federal Law Claims with Prejudice and Dismissing Plaintiffs' State Law Claims without Prejudice, each and all federal law claims brought by Plaintiffs against Texas A&M University and the individuals employed by the University are hereby **DISMISSED WITH PREJUDICE**. Pursuant to that same Order, each and all state law claims brought by Plaintiffs against the individuals employed by the University and the remaining Defendants are hereby **DISMISSED WITHOUT PREJUDICE**. All relief not herein provided is expressly **DENIED**. All Parties are **ORDERED** to bear their own costs and attorney's fees incurred herein to date. **THIS IS A FINAL JUDGMENT**.

IT IS SO ORDERED.

DONE this 23rd day of July, 2002, at Galveston, Texas.

/s/ Samuel B. Kent
SAMUEL B. KENT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

JACQUELYNN KAY SELF *et al.*	§	
Plaintiffs,	§	
	§	CIVIL ACTION
v.	§	NO. G-01-721
TEXAS A&M UNIVERSITY *et al.*	§	
Defendants.	§	

ORDER DISMISSING PLAINTIFFS' FEDERAL LAW CLAIMS WITH PREJUDICE AND DISMISSING PLAINTIFFS' STATE LAW CLAIMS WITHOUT PREJUDICE

(Filed Jul. 23, 2002)

The Texas A&M Bonfire ("Bonfire") tragically collapsed in the early hours of November 18, 1999, killing twelve students and injuring an additional twenty-seven. This action is one of six virtually identical lawsuits[1] now

[1] The Court is issuing this Order in all six lawsuits, which are styled as *Breen v. Tex. A&M Univ., et al.*, No. G-01-CV-670 (S.D. Tex. filed Oct. 24, 2001); *Comstock v. Tex. A&M Univ., et al.*, No. G-01-CV-730 (S.D. Tex. filed Nov. 19, 2001); *Davis v. Tex. A&M Univ., et al.*, No. G-01-CV-720 (S.D. Tex. filed Nov. 16, 2001); *Kimmel v. Tex. A&M Univ., et al.*, No. G-01-CV-719 (S.D. Tex. filed Nov. 16, 2001); *Scanlan v. Tex. A&M Univ., et al.*, No. G-01-CV-733 (S.D. Tex. filed Nov. 19, 2001); and *Self, et al. v. Tex. A&M Univ., et al.*, No. G-01-CV-721 (S.D. Tex. filed Nov. 16, 2001). The Plaintiffs are, in *Breen*, the brother/administrator and parents of Christopher Breen, a former student killed in the collapse; in *Comstock*, John Andrew Comstock, the most severely injured surviving victim of the collapse, and his mother; in *Davis*, Bill Davis, one of the students injured in the collapse; in *Kimmel*, the estate and parents of Lucas Kimmel, one of the students killed in the collapse; in *Scanlan*, Lauren Scanlan, one of the students injured in the collapse, and her parents; and in *Self*, the

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pending before the Court wherein the Plaintiffs allege that Texas A&M University ("the University") and various former and present high-level University employees[2] ("University Officials") violated 42 U.S.C. § 1983 when they deprived the Bonfire victims of their Fourteenth Amendment right to substantive due process by acting with deliberate indifference to the state created danger that killed or injured them. Plaintiffs further allege that Defendants negligently harmed the victims in violation of Texas state law.[3] On May 24, 2002, Defendants filed a Motion for Summary Judgment wherein they assert that they are immune from liability with respect to Plaintiffs'

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mother/administrator of Jerry Don Self (student killed), the mother/administrator and father of Bryan McClain (student killed); the father/administrator and mother of Christopher Lee Heard (student killed), the father/administrator and mother of Chad Powell (student killed), Matthew Robbins (student injured), Dominic Braus (student injuried) and his mother. In all, these six suits represent eleven (six killed, five injured) of the thirty-nine total victims of the Bonfire collapse.

[2] The University Officials include: Russell Thompson; Dr. J. Malon Southerland; Dr. William Kibler; Dr. John J Koldus, III; Dr. Ray M. Bowen; Dr. Kevin Jackson; Dr. Zack Coapland; Maj. Gen. M.T. Hopgood; Brig. Gen. Don Johnson; Maj. Rebecca Ray; Jim Reynolds; Robert Harry Stiteler; and Michael Krenz. Only Thompson, Bowen and Southerland are named as Defendants in all six suits. The remaining individuals are named as Defendants in *Self* only, or *Self* and *Comstock*. The Court will hereinafter refer to the University and the University Officials together as "Defendants."

[3] The *Self* and *Comstock* Plaintiffs have also asserted state law claims against a number of Defendants who, although intimately involved with the University, were not employed by the University at the time of the Bonfire collapse. The analysis in Part II and Part III of this Order pertains only to the merits of Plaintiffs' claims against the University and the University Officials; and in no way comments upon the validity of any Bonfire-related claim, filed by any Plaintiff, against any non-state actor Defendant.

federal and state law claims and alternatively, that Plaintiffs have failed to state a viable cause of action upon which relief can be granted.[4] After very carefully and thoughtfully considering Defendants' well-prepared Motion, Plaintiffs' insightful Responses thereto, the lengthy record in this matter and the applicable law, the Court concludes that Defendants' Motion for Summary Judgment must be **GRANTED IN PART** with respect to Plaintiffs' federal law claims. For reasons set forth below, the Court need not reach the merits of Defendants' Motion for Summary Judgment with respect to Plaintiffs' allegations of negligence, as the Court respectfully declines to exercise supplemental jurisdiction over Plaintiffs' state law claims.[5]

I.

The following facts are primarily derived from the Final Report of the Special Commission on the 1999 Texas A&M Bonfire ("Final Report"). At this stage of the proceedings, the Parties have accepted the Final Report – the product of hundreds of hours of investigation and expert analysis – as an authoritative account of the history of Bonfire, the mechanics of the 1999 collapse and the factors that contributed to this far-reaching tragedy. The Court likewise adopts the Final Report as a definitive narrative of the relevant facts for purposes of its instant analysis.

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[4] Defendants' Motion for Summary Judgment incorporates the legal arguments and authorities contained within their Rule 12(b)(6) Motion to Dismiss, filed December 19, 2001.

[5] Several of the Plaintiffs are not asserting state law claims in the instant lawsuits, as they have already filed such claims in various state courts. Part IV of this Order, which pertains to the Court's supplemental jurisdiction, is therefore inapplicable to those Plaintiffs.

However, because the Court wishes to provide as comprehensive of a factual summary as possible, the following account also includes several facts gleaned from the summary judgment evidence.

The much loved and revered Texas A&M Bonfire tradition began humbly, with a burning trash heap in 1909. Over the ensuing ninety years, Bonfire grew into one of the most cherished traditions of Texas A&M University, uniting students, administrators, alumni and the surrounding community each September, October and November. The process of cutting trees into logs, stacking the logs into a towering structure and preparing to ceremoniously burn the edifice on the eve of Texas A&M's annual football game with the University of Texas occupied over five thousand students for an estimated 125,000 hours each fall. At the culmination of these efforts, an estimated forty to eighty thousand individuals gathered annually to watch Bonfire ignite and burn. The University's students, or "Aggies," believe that Bonfire symbolizes their burning desire to "beat the hell out of t.u" at the next day's football game. It is symbolic not only of one school deeply rooted in tradition, but is representative of the entire Nation's passionate fascination with the most venerated aspects of collegiate football.

Bonfire may have started out as a pile of wood and trash, but by 1999, it had evolved into a massive structure with measurable technical complexity. The initial switch from trash to logs took place in the 1940s, when the students introduced a center pole and a teepee-shaped design. Because a teepee-shaped structure can only reach as high as its tallest log, the students began building Bonfire with multiple layers of logs in the 1960s. The 1968 and 1969 Bonfires utilized this multi-tier design, with the

1969 Bonfire reaching 109 feet – the tallest Bonfire ever recorded. In the late 1970s, Bonfire began to take on a wedding cake-shaped design, with multiple cylindrical layers stacked one on top of the other. Since the 1980s, all Bonfires have been (1) built in the wedding cake design; (2) sixty to eighty feet tall; (3) six tiers bound with wire; (4) built around a two-part spliced center pole; and (5) surrounded by four perimeter poles with guy ropes. A completed 1990s Bonfire likely weighed over two million pounds. No other institution of higher learning in the world lays claim to a blazing bonfire of such monumental proportions, and it is an instantly recognizable source of pride and "fighting spirit" to past, present and future Aggies around the globe.

Even in light of Bonfire's massive proportions, its design and construction always remained almost the exclusive purview of the students. The "Redpots," student leaders between the ages of 19 and 21, controlled the Bonfire build year after year. The Repots were not licensed engineers or architects, lacked formalized construction training and were not required to attend classes on architectural design or building techniques. Moreover, Redpots possessed less than two months experience as "Junior Redpots" before being promoted to Redpots as seniors, failed to utilize blueprints and relied on building techniques that were passed down orally from their student predecessors. Yet Defendants entrusted the Redpots with the primary responsibility for erecting the enormous Bonfire each fall.

Defendants undoubtably recognized the dangers of Bonfire. In fact, one University document noted that "[i]t is a well-established fact that Bonfire constitutes by far the single most liability laden student activity on campus."

Other University documents warned that "Bonfire is, by its vary nature, a hazardous activity"; "Bonfire involves thousands of students engaged in a variety of activities, some of which involve potential risks and liability and therefore supervision is paramount"; and "[a]s we all are aware, Bonfire is a very risky undertaking from a safety and liability perspective." Blaine Lewis, a Junior Redpot, wrote in a 1997 paper that stacking the Bonfire's logs "has the potential for great tragedy at any time." Against this backdrop, the University purchased a two million dollar general liability insurance policy to insure against a catastrophic disaster on campus.

Nevertheless, very few truly significant restrictions were ever imposed, communicated or uniformly enforced to protect the safety of Bonfire participants. However, Defendants did not ignore Bonfire safety altogether. Faculty and staff frequently visited the Bonfire site for observation purposes. Defendants created the faculty post of "Bonfire Advisor," implemented a policy that restricted access to the Bonfire site during construction and intermittently passed other safety measures in response to particular "trigger" events. For instance, Defendants (1) imposed a fifty-five foot height restriction on Bonfire in response to fire hazard complaints; (2) required Bonfire participants to attend tree-cutting training programs after they received reports of cut-site accidents; (3) appointed an alcohol awareness committee and organized the "Don't Shatter the Tradition" campaign to combat excessive Bonfire-related drinking; and (4) prohibited students from riding in the back of pick-up trucks after a motor vehicle fatality. The Final Report characterizes this conduct as a "reactive risk management model" and explains that Defendants only implemented very specific remedial measure in response

to spe[illegible] triggers. Apparently, no specific events or incidents triggered Defendants to query whether Bonfire was structurally unsound prior to 1999. Consequently, they never inquired into Bonfire's structural integrity; and therefore neglected to reexamine Bonfire's design prior to the collapse.

It can be reasonably argued that Defendants *should* have undertaken a study of Bonfire's structural soundness in 1994. That year, the partly constructed edifice suffered a partial collapse (or "lean") that should have alerted the State Defendants of Bonfire's instability. However, the 1994 mishap was attributed by those involved to wet and unstable ground, not structural integrity. In fact, those involved praised the structural integrity of the 1994 Bonfire because heavy equipment was needed to pull the stack apart. Consequently, the mishap failed to trigger a design re-examination. According to the Final Report, the "people obviously concerned with Bonfire safety, did in fact misinterpret these events and missed clear warning signs about structural integrity. This tunnel vision in decision [was] due . . . to a cultural bias in which legitimate courses of action outside past experience or contrary to the University's pre-disposition are often not considered. . . . More objective interpretations or more conservative interpretations, which might have led to a structural reassessment, could reasonably have been considered."

Regrettably, because of Defendants' reluctance to depart from or question "the way its always been," no one viewed the 1999 Bonfire as a potentially hazardous towering structure tenuously held together with wire. More significantly, no one proposed a sweeping reassessment of Bonfire's construction process. And the results were catastrophic and heartbreaking. The 1999 Bonfire

collapsed prior to completion, killing twelve students and injuring twenty-seven others, resulting in an enormous groundswell of grief and remorse which continues to reverberate to the deepest recesses of the worldwide Aggie community.

The Final Report characterizes the physical mechanics of the collapse as a "containment failure" in the first tier of logs, primarily caused by (1) excessive internal stresses driven primarily by aggressive wedging of second tier logs into the first tier; and (2) inadequate containment strength caused by insufficient binding support in the wiring used to tie the logs together. Moreover, the first stack of the 1999 Bonfire was not wrapped with steel cables, further reducing containment strength. Steel cables had been wrapped around the first tier as a matter of course for several years prior to 1999. The Final Report also identifies the overarching factors that brought about the physical collapse: the absence of a proactive risk management model; the University community's cultural bias impeding risk identification; the lack of student leadership knowledge and skills pertaining to structural integrity; and the lack of formal, written Bonfire design plans or construction methodology. Together, these factors created an environment wherein students were permitted to construct a complex and dangerous structure without adequate engineering supervision or physical safety controls and led to a complex organizational failure. The Bonfire collapse was not caused by a specific event, error or omission in 1999, but, rather, by decisions and actions taken by both students and University officials over many, many years.

II.

The Court will initially consider Plaintiffs' § 1983 claims against the University, before turning to Plaintiffs' claims against the University Officials. In their Motion for Summary Judgment, Defendants maintain that the University is entitled to summary judgment in its favor on the basis of Eleventh Amendment immunity. The Court agrees.

The University is a state-funded state institution of higher education. *See* Tex. Educ. Code § 86.02 (signifying that Texas A&M University was created by the laws of the State of Texas). Consequently, Plaintiffs are barred from bringing this suit against the University unless they are able to overcome the State's jurisdictional immunity in federal court, commonly referred to as "Eleventh Amendment" immunity.[6] *See Quern v. Jordan,* 440 U.S. 332, 341, 99 S. Ct. 1139, 1145, 59 L.Ed.2d 358 (1979). Eleventh Amendment immunity prohibits actions against a state entity in federal court, unless either the state has waived its sovereign immunity or Congress, pursuant to another provision in the Constitution, has expressly abrogated the state's immunity. *See Will v. Mich. Dept. of State Police,* 491 U.S. 58, 66, 109 S. Ct. 2304, 2309-10, 105 L.Ed.2d 45 (1989); *Welch v. Tex. Dept. of Highways and Pub. Transp.,* 483 U.S. 468, 473-74, 107 S. Ct. 2941, 2946, 97 L.Ed.2d 389 (1987). A state's intention to waive its sovereign

[6] The Court notes that "Eleventh Amendment" immunity is not actually derived from the Eleventh Amendment to the Constitution. *See Alden v. Maine,* 527 U.S. 706, 713, 199 S.Ct. 2240, 2246, 144 L.Ed.2d 636 (1999) (explaining that the phrase "Eleventh Amendment immunity" is "convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment.").

immunity must be "unequivocally expressed." *Stem v. Ahearn,* 908 F.2d 1, 4 (5th Cir. 1990) (citing *Port Authority Trans-Hudson Corp. v. Feeney,* 495 U.S. 299, 305-06, 100 S.Ct. 1868, 1873, 109 L.Ed.2d 264 (1990)). Significantly, Texas has not consented to be sued in federal court by individuals regarding the 1999 Bonfire collapse, nor has state sovereign immunity been abrogated or compromised by Congress with the passage of § 1983. The Supreme Court has held, in fact, that states are not "persons" subject to suit within § 1983's scope. *See Arizonans for Official English v. Ariz.,* 520 U.S. 43, 69, 117 S. Ct. 1055, 1069, 137 L.Ed.2d 170 (1997) (citing *Will,* 491 U.S. at 71, 109 S. Ct. at 2312); *see also Cronen v. Tex. Dept. of Human Servs.,* 977 F.2d 934, 936 (5th Cir. 1992); *Stem,* 908 F.2d at 4. Accordingly, the Court finds that the University is shielded from liability in this matter by its Eleventh Amendment immunity, as a matter of law.[7] Consequently, Defendants' Motion for Summary Judgment is hereby **GRANTED** with respect to Plaintiffs' federal law claims

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[7] Previous decisions of the Fifth Circuit and District Courts within the Southern District of Texas have consistently afforded Eleventh Amendment immunity to state universities, including Texas A&M. *See, e.g.,Tex. ex rel. Bd. of Regents of Univ. of Tex. Sys. v. Walker,* 142 F.3d 813, 820 n. 10 (5th Cir. 1998) (citing *Regents of Univ. of Cal. v. Doe,* 519 U.S. 425, 429-31, 117 S. Ct. 900, 903-04, 137 L.Ed.2d 55 (1997) and *United Carolina Bank v. Bd. of Regents of Stephen F. Austin State Univ.,* 665 F.2d 553, 556-61 (5th Cir. 1981)); *Mangaroo v. Nelson,* 864 F.2d 1202, 1204 (5th Cir. 1989); *Gay Student Servs. v. Tex. A&M Univ.,* 737 F.2d 1317, 1333-334 (5th Cir. 1984); *Lowery v. Univ. of Houston-Clear Lake,* 82 F. Supp.2d 689, 693 (S.D. Tex. 2000); *Chacko v. Tex. A&M Univ.,* 960 F. Supp. 1180, 1197-198 (S.D. Tex. 1997); *Baldwin v. Univ. of Tex. Med. Branch at Galveston,* 954 F. Supp. 1022, 1030 (S.D. Tex. 1996); *Idoux v. Lamar Univ. Sys.,* 817 F. Supp. 637, 639-640 (E.D. Tex. 1993); *Zentgraf v. Tex. A&M Univ.,* 492 F. Supp. 265, 271-72 (S.D. Tex. 1980).

against the University and each and all of those claims are hereby **DISMISSED WITH PREJUDICE.**

III.

Plaintiffs also allege that the University Officials are liable for the harm that befell the Bonfire victims pursuant to § 1983.[8] In response, Defendants contend that Plaintiffs' § 1983 claim against the University Officials must be dismissed pursuant to Fed. R. Civ. P. 12(b)(6), or, alternatively, on qualified immunity grounds. The Court need not reach the qualified immunity issue, however, because Defendants correctly assert that a Rule 12(b)(6) dismissal is warranted.

Legal Standard for Rule 12(b)(6) Dismissal

The Federal Rules of Civil Procedure authorize a court, upon suitable showing, to dismiss any action or any claim within an action for failure to state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6). Put another way, Rule 12(b)(6) dismissal is appropriate when the "the plaintiff would not be entitled to relief under any set of facts or any possible theory that he could prove consistent with the allegations in his complaint." *Jones v. Greninger,* 188 F.3d 322, 324 (5th Cir. 1999); *see also* Fed. R. Civ. P. 12(b)(6). When making this determination, the Court accepts as true all well-pleaded allegations in the complaint, and views them in a light most favorable to the plaintiff. *See Malina v. Gonzales,* 994 F.2d 1121,

[8] Plaintiffs have sued the University Officials in their individual capacities only.

1125 (5th Cir. 1993). A plaintiff must plead specific facts in order to avoid dismissal for failure to state a claim and consequently, the Court will not accept conclusory allegations or unwarranted deductions of fact contained within the plaintiff's complaint as true. *See Tuchman v. DSC Communications Corp.,* 14 F.3d 1061, 1067 (5th Cir. 1994). Unlike a Motion for Summary Judgment, a Motion to Dismiss should be granted only when it appears without a doubt that the plaintiff can prove no set of facts in support of his claims that would entitle him to relief. *See Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L.Ed.2d 80 (1957).

In considering a motion to dismiss for failure to state a claim, a district court must limit itself to the contents of the pleadings, including attachments thereto. *See* Fed. R. Civ. P. 12(b)(6). However, "[d]ocuments that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to [the plaintiff's] claims." *Collins v. Morgan Stanley Dean Whitter,* 224 F.3d 496, 498-99 (5th Cir. 2000) (citing *Venture Assoc. Corp. v. Zenith Data Sys. Corp.,* 987 F.2d 429, 431 (7th Cir. 1993)); *see also Chambers v. Time Warner, Inc.,* 282 F.3d 147, 153 (2d Cir. 2002); *Branch v. Tunnell,* 14 F.3d 449, 453-54 (9th Cir. 1994); *In re Securities Litigation BMC Software, Inc.,* 183 F. Supp. 2d 860, 883 (S.D. Tex. 2001); *Franks v. Prudential Health Care Plan, Inc.,* 164 F. Supp.2d 865, 872 (S.D. Tex. 2001). By attaching documents that are integral to the plaintiff's claims, "the defendant merely assists the plaintiff in establishing the basis of the suit, and the court in making the elementary determination of whether a claim has been stated." *Collins,* 224 F.3d at 499. In these cases, the Complaints on file repeatedly refer to the Final

Report; and Plaintiffs' allegations are clearly based upon the findings contained therein. Accordingly, in reviewing Plaintiffs' federal claims under Rule 12(b)(6), the Court will equally consider the Plaintiffs' well-pleaded allegations and the facts set out in the Final Report.

42 U.S.C. § 1983

Section 1983 provides a cause of action against "[e]very person who, under color of any statute . . . of any State . . . subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws. . . . " 42 U.S.C. § 1983; *see also Moore v. Willis Indep. Sch. Dist.,* 233 F.3d 871, 874 (5th Cir. 2000) (citing *Leffall v. Dallas Indep. Sch. Dist.,* 28 F.3d 521, 525 (5th Cir. 1994)). "Rather than creating substantive rights, § 1983 simply provides a remedy for the rights that it designates." *Johnston v. Harris County Flood Control Dist.,* 869 F.2d 1565, 1573 (5th Cir. 1989). The assertion of an underlying constitutional or statutory violation is therefore a predicate to liability under § 1983. *See id.* In their attempt to establish federal liability against the University Officials, Plaintiffs premise their § 1983 claims upon an alleged substantive due process violation, arising from the "state created danger" theory.[9]

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[9] Defendants initially argue that Plaintiffs' § 1983 claims must be dismissed because the state created danger theory was not well-settled law in this Circuit at the time of the Bonfire collapse. The Court rejects this argument, however because the Fifth Circuit's recent decision in *McClendon v. City of Columbia,* 258 F.3d 432 (5th Cir. 2001), explains that the state created danger theory was the law in this Circuit well-before 1999. *See id.* at 441 ("We conclude that . . . [on July 12, 1993] it

(Continued on following page)

State Created Danger Theory

In general, state governments are under no affirmative duty to provide protective services: "[T]he Due Process Clause generally confers no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty or property interests of which the government itself may not deprive the individual ... [Thus,] a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *DeShaney v. Winnebago County Dep't of Social Servs.,* 489 U.S. 189, 196-97, 109 S. Ct. 998, 1003-04, 103 L.Ed.2d 249 (1989); *see also McClendon v. City of Columbia,* 258 F.3d 432, 436 (5th Cir. 2001); *Walton v. Alexander,* 44 F.3d 1297, 1302 (5th Cir. 1995) (*en banc*). Rather, the Constitution imposes a duty on the state to protect particular individuals only in "certain limited circumstances." *DeShaney,* 489 U.S. at 198, 109 S. Ct. at 1004. The Fifth Circuit has recognized two such limited scenario, namely, when the state has a special relationship with the person or when the state exposes a person to a danger of its own creation, or a "state created danger." *See McClendon,* 258 F.3d at 436. Plaintiffs do not argue that the University Officials had a special relationship with the

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was clearly established that a state actor creating a danger, knowing of that danger, and using his authority to create an opportunity for a third person to commit a crime that otherwise might not have existed, was subject to liability for a violation of the victim's rights."). The fact that the Fifth Circuit recently agreed to rehear *McClendon en banc* does not change the Court's conclusion. *McClendon* is the best authority currently available on this issue and the Court sees no reason to depart from its reasoning. On the assumption that this ruling will be appealed, the Parties are of course free to seek reassessment of the present state of the law. But any modification thereof is a policy consideration best left to the Fifth Circuit.

Bonfire victims, rather, they allege that the University Officials violated the Due Process Clause by failing to protect the victims from a state created danger.

The Fifth Circuit set out the two basic requirements of the state created danger theory in *Piotrowski v. City of Houston,* 51 F.3d 512 (5th Cir. 1995). A plaintiff asserting such a claim must show the (1) the state actors increased the danger to him or her; and (2) the state actors acted with deliberate indifference. *See id.* at 515; *see also McClendon,* 258 F.3d at 437; *Doe v. Hillsboro Indep. Sch. Dist.,* 113 F.3d 1412, 1415 (5th Cir. 1997); *Johnson v. Dallas Indep. Sch. Dist.,* 38 F.3d 198, 201 (5th Cir. 1994). Plaintiffs allege that the University Officials created a danger by failing to ensure the Bonfire's structural integrity. The facts surrounding the Bonfire collapse clearly tend to suggest that the conduct of the University Officials may have contributed, at least in part, to the 1999 Bonfire collapse. But *even if* the University Officials created an environment that was dangerous to the Bonfire victims (and the Court is expressly not now so finding), it is quite clear that they did not do so with "deliberate indifference"- the requisite culpability to make out a constitutional violation.[10]

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[10] Furthermore, *even if* the University Officials did create an environment that was dangerous to the Bonfire victims, that fact appears to be insufficient to satisfy the first requirement for the state created danger theory. The Final Report concluded that the students who were building the 1999 Bonfire (a group which includes the students who were killed and/or harmed) also played a role in the harm that befell them. None of the Fifth Circuit cases recognizing the state created danger doctrine have involved an incident for which the victims were partially at fault. Rather, the relevant cases have only recognized state created dangers where state actors created situations that increased the risk of danger from *third parties* to specific individuals.

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Deliberate Indifference

There is a significant distinction between a tort and a *constitutional* wrong. *Leffall,* 28 F.3d at 532 (citing *de Jesus Benavides v. Santos,* 883 F.2d 385, 388 (5th Cir. 1989)). The Supreme Court has made it clear that "[t]he Due Process Clause of the Fourteenth Amendment is not implicated by the lack of due care of an official causing unintended injury to life, liberty or property." *Davidson v. Canon,* 474 U.S. 344, 347, 106 S. Ct. 668, 670, 88 L.Ed.2d 677 (1986). Rather, reckless or grossly negligent conduct by state officials falls squarely within the ambit of traditional state tort law. *See de Jesus Benavides,* 883 F.2d at 388. Simply put, where a government official is merely negligent in causing the injury, no procedure for compensation is *constitutionally* required. *See Davidson,* 474 U.S. at 347, 106 S. Ct. at 670. Accordingly, the conduct of a state actor fails to violate a victim's right to substantive due process unless that conduct is carried out with deliberate indifference.

The Fifth Circuit defines "deliberate indifference" as "'a lesser form of intent' rather than a 'heightened form of negligence." *Leffall,* 28 F.3d at 531; *Doe v. Taylor Indep. Sch. Dist.,* 15 F.3d 443, 453 n13 (5th Cir. 1994) (explaining that deliberate indifference involves a higher degree of certainty than gross negligence). To establish deliberate indifference, "the environment created by the state actors must be dangerous; they must know it is dangerous; and . . . they must have used their authority to create an opportunity that would not otherwise have existed for the

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See, e.g. McClendon, 258 F.3d at 432; *Piotrowski v. City of Houston,* 51 F.3d at 512; *Johnson,* 38 F.3d at 198. On this basis alone, the state created danger theory is legally inapplicable here.

. . . crime to occur." *Johnson,* 38 F.3d at 201. Deliberate indifference can arise from "tortious conduct exceeding mere negligence but not quite rising to the level of intentional, e.g. deliberate (or conscious) indifference, recklessness or gross negligence." *Salas v. Carpenter,* 980 F.2d 299, 307 (5th Cir. 1992). Essentially, "[t]he key to the state created danger cases . . . lies in the state actors' culpable knowledge and conduct in affirmatively placing an individual in a position of danger, effectively stripping a person of [his or] her ability to defend [himself or] herself, or cutting off potential sources of private aid." *Johnson,* 38 F.3d at 201 (quotations and citations omitted).

In *Johnson,* the Fifth Circuit noted that *Wood v. Ostrander,* 879 F.2d 583 (9th Cir. 1989), exemplifies the state created danger theory of liability. In that case, a police officer arrested a drunken driver and impounded his car, leaving the driver's female passenger alone at night, without any means of getting home, in an area notorious for criminal activity. She was subsequently raped by a stranger who offered her a ride. *See id.* at 586. Other cases applying the state created danger theory are to a similar effect. *See, e.g. Dwares v. City of New York,* 985 F.2d 94, 99 (2d Cir. 1993) (holding that it would violate due process for police officers to conspire with and sanction violence by "skinheads" against persons burning American flags); *L.W. v. Grubbs,* 974 F.2d 119, 121-22 (9th Cir. 1992) (holding that § 1983 plaintiff had stated a claim by alleging that she was a nurse employed by the state, that her supervisors had instructed her to work alone with a known sex offender after leading her to believe that she would not be made to work under such conditions and that she had been assaulted by the sex offender while alone with him); *Freeman v. Ferguson,* 911 F.2d 52 (8th Cir. 1980) (finding a

viable § 1983 claim where a woman was killed by her estranged husband after the chief of police had directed his officers to ignore her pleas that they stop the husband, who was the police chief's friend, from threatening and intimidating her); *White v. Rochford,* 592 F.2d 381, 382-83 (7th Cir. 1979) (finding that two small children stated a § 1983 claim by alleging that police officers arrested their uncle and left them unattended in a car on the side of the freeway). In light of these authorities, the Court emphasizes that deliberate indifference arises in cases involving conduct that is substantially more abhorrent, and significantly more detestable, than even gross negligence.

The conduct of the University Officials does not rise to such a level, as a matter of law. As demonstrated by the Final Report, there is *no* evidence that the University Officials were aware of the impending Bonfire collapse. To the contrary, the Final Report concluded that "[n]o one in the [University's] administration ever interpreted ongoing behavioral problems as indications that safe Bonfire design and construction was beyond the capabilities of student leaders." Nor do the facts suggest that the University Officials directly prevented increased Bonfire safety or opposed a review of Bonfire's structural integrity. They simply failed to recognize that change was desperately needed. They built Bonfire the way that it had always been built and the way that it had always succeeded. For them, Bonfire was, and is, an institution. And, as stated in the Final Report, "leaders do not change institutions unless there is a clearly perceived need to do so."

The record presently before the Court amply demonstrates that the University Officials were aware of the dangers posed by Bonfire. Consequently, it can be persuasively argued that they may have acted negligently,

possibly even grossly so, and that the Bonfire collapse could have been prevented had cautionary measures been implemented. However, despite their knowledge of Bonfire's extremely risky nature and their failure to proactively avert or reduce those risks, the evidence equally shows that the University Officials were unaware of the *precise* risk at hand – the risk that the entire Bonfire would come tumbling down. Rather, the University Officials believed that ninety years of successful Bonfire building experience was enough in itself to ensure that the tradition would safely continue. Although the University Officials' lack of awareness might appear naive, and possibly even foolish, in retrospect, it cannot support a finding of deliberate indifference. This is not a case in which state actors "brought the victim into close proximity with a specific individual known to be likely to commit violence, . . . or abandoned the victim in a highly dangerous environment, . . . or conspired with [a] private actor who inflicted the deprivation." *Leffall,* 28 F.3d at 531. Plaintiffs concede that the University Officials took *some* measures to ensue Bonfire safety (i.e. height restriction, appointment of a Bonfire advisor, tree-cutting training program, alcohol awareness committee, prohibition against riding in the back of pick-up trucks). Simply put, because the University Officials were indeed concerned with Bonfire Safety (albeit, in hindsight, not concerned enough, or in precisely the right way), the Court cannot conclude that their conduct rose to the egregious level of a constitutional violation, as a matter of law.[11] *See id.* at

[11] The Court acknowledges that the existence of deliberate indifference is often a factual determination. However, because the Final Report affirmatively discloses that the University Officials in this case lacked the requisite culpability with respect to the alleged

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531-32 (concluding that even if school officials' decision to sponsor dance at high school, despite awareness of dangers posed thereby, was negligent, such conduct did not rise to the level of deliberate indifference to the rights of a student who was killed by random gunfire in the school parking lot after the dance); *Doe,* 15 F.3d at 456 n. 12 (observing that "good faith but ineffective responses" by state actors tend to defeat claims of deliberate indifference). In reaching this conclusion, the Court in no way condones the reactive risk management policy of the University Officials or their cultural bias against departing from tradition in favor of newer safer measures. Rather, the Court recognizes the distinction between state law torts and constitutional wrongs. Expanding the substantive due process clause to encompass the allegations at issue here would violate well-settled principles of constitutional law and expand the protections of the Fourteenth Amendment beyond their appointed boundaries. Therefore, because Plaintiffs fail to allege, and cannot allege, a cognizable substantive due process violation, as a matter of law, Plaintiffs' § 1983 claims against the University Officials warrant dismissal pursuant to Fed. R. Civ. P. 12(b)(6). Defendants' Motion for Summary Judgment is therefore **GRANTED** with respect to Plaintiffs' federal law claims against the University Officials and each and all of such claims are hereby **DISMISSED WITH PREJUDICE**.

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violation of the Bonfire victims' constitutional rights, it is not only appropriate, but mandatory in this instance to conclude that the University Officials failed to act with deliberate indifference, as a matter of law.

IV.

Having dismissed all of Plaintiffs' federal law claims, the Court is now faced with six negligence lawsuits governed purely by state tort law. Thus, the Court must decide whether to retain supplemental jurisdiction over Plaintiffs' remaining claims. In evaluating this matter, the Court is guided by the supplemental jurisdiction statute, 28 U.S.C. § 1367. Section (a) of that statute provides that "in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to the claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). Section (c) of the statute refines the supplemental jurisdiction doctrine by enumerating four circumstances in which District Courts have discretion to decline supplemental jurisdiction over state law claims: (1) when the state law claims raise novel or complex issues of state law; (2) when the state law claims substantially predominate over the claims within the district court's original jurisdiction; (3) when the district court dismisses the claims over which it has original jurisdiction; and (4) in exceptional circumstances, if there are other compelling reasons for declining jurisdiction. 28 U.S.C. § 1367(c). In this case, the third factor enumerated in § 1367(c) is clearly present, and to only a slightly lesser extent, the second and fourth factors as well. The Court has dismissed all of the claims that were within the Court's original jurisdiction and only Plaintiffs' state law claims remain. And those claims are manifestly better suited for resolution by a state court, applying squarely applicable state law, in front of a jury of state citizens. Accordingly, the

Court respectfully declines to exercise its supplemental jurisdiction over Plaintiffs' state law claims. *See Noble v. White,* 996 F.2d 385, 395 (5th Cir. 1993) ("District courts enjoy wide discretion in determining whether to retain supplemental jurisdiction over a state law claim once all federal claims are dismissed"); *Rhyne v. Henderson,* 973 F.2d 386, 395 (5th Cir. 1992) ("The district court has properly dismissed all of the federal questions that gave it original jurisdiction in this case. Therefore, we find that the district court's dismissal of the state law claims was proper under 28 U.S.C. § 1367(c)"); *see also United Mine Workers of Am. v. Gibbs,* 383 U.S. 715, 726, 86 S. Ct. 1130, 1139, 16 L.Ed.2d 218 (1966) ("Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of the applicable law."). As such, Plaintiffs' state law claims are hereby **DISMISSED WITHOUT PREJUDICE**. Plaintiffs are free to re-file their state law claims against Defendants in state court, if they so desire, either by filing new actions or by seeking leave to intervene in the state cases that are already well underway. In doing so, Plaintiffs are of course subject to the applicable limitations requirements.[12] All Parties are to bear their own taxable costs, expenses and attorneys' fees incurred herein to date; and all other pending Motions, filed by any of the Parties to this litigation, are hereby **DENIED** as moot.

IT IS SO ORDERED.

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[12] For the same reasons, the Court also declines to exercise supplemental jurisdiction over the *Self* and *Comstock* Plaintiffs' state law claims against the non-state actor Defendants. Thus, those claims are likewise **DISMISSED WITHOUT PREJUDICE**, rather to proceed in either new or extant state court litigation, as appropriate.

DONE this 23rd day of July, 2002, at Galveston, Texas.

/s/ Samuel B. Kent
SAMUEL B. KENT
UNITED STATES DISTRICT JUDGE